No. 91-7580-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
March 9, 1992

See also:
91-6745
91-7399

Title: Gary Graham, Petitioner
v.
James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Tigar,Michael E.

Counsel for respondent: Palmer,Charles A.

Entry	Date	Note	Proceedings and Orders
1	Mar 9 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 8 1992		Brief amicus curiae of Patrick F. Rogers filed.
4	May 8 1992		Brief of respondent James A. Collins, Director in opposition filed.
5	May 14 1992		DISTRIBUTED. May 29, 1992
6	May 20 1992	X	Reply brief of petitioner Gary Graham filed.
8	Jun 1 1992		REDISTRIBUTED. June 5, 1992
10	Jun 8 1992		Petition GRANTED.
			**********
11	Jul 16 1992		Joint appendix filed.
12	Jul 16 1992		* Joint Appendix in two volumes.
13	Jul 21 1992		SET FOR ARGUMENT WEDNESDAY, OCTOBER 14, 1992.(3RD CASE).
15	Jul 23 1992		Brief amicus curiae of Miguel A. Richardson filed.
14	Jul 24 1992		Brief of petitioner Gary Graham filed.
16	Jul 27 1992		Record filed.
		*	Original proceedings U.S. Court of Appeals, Fifth Circuit and U.S. District Court, S.Dist. of Texas.
17	Aug 24 1992		Brief of respondent James A. Collins, Director filed.
18	Sep 1 1992		CIRCULATED.
19	Sep 23 1992	X	Reply brief of petitioner filed.
20	Oct 14 1992		ARGUED.

ORIGINAL

No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

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GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Gary Graham moves this Court for leave to file the attached Petition for Writ of Certiorari without payment of costs and to proceed in forma pauperis in this Court. An affidavit in support of this motion is being submitted to this Court under separate cover.

Respectfully Submitted,

Michael E Tigar

* Michael E. Tigar
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* Counsel of Record for Petitioner
GARY GRAHAM

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Gary T. Graham being first duly sworn, depose and say that I am the Petitioner in the above- entitled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   N/A

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

   Unknown

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes___ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes___ No X
   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are depending upon you for support and state your relationship to those persons.

   N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Gary Graham

Subscribed and sworn to before me this 6th day of March 1992.

Notary

My commission expires 5-15-95

ORIGINAL

No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE

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QUESTIONS PRESENTED

May a State limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted "deliberately" and might be dangerous in the future, and afford no other basis for taking his youth into account?

May a State similarly limit the jury's consideration of such a defendant's positive character traits and the unfortunate circumstances of his family background?

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

Petitioner Gary Graham prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the en banc United States Court of Appeals for the Fifth Circuit in his case.

CITATION TO OPINION BELOW

The en banc opinion of the United States Court of Appeals for the Fifth Circuit; denying habeas relief to Mr. Graham by a single vote (7-6), was announced on January 3, 1992, and has not

yet been reported. A copy of the printed slip opinion is annexed hereto as Appendix A.[1]

JURISDICTION

Mr. Graham invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Eighth Amendment to the United States Constitution, which reads in pertinent part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law;

and the former Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989), which provided

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

[1] The prior actions of the Court of Appeals concerning Mr. Graham's case are also annexed hereto. See Appendix B (Judgment); Appendix C (Opinion granting rehearing en banc); Appendix D (Opinion granting habeas relief on remand from this Court in light of Penry); Appendix E (original panel opinion denying habeas relief).

> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. . . . .

STATEMENT OF THE CASE

En banc and by a vote of 7 to 6, the Fifth Circuit has, as the dissenting judges pointed out in two eloquent opinions, (a) undercut the rationale of decisions written or joined in by every member of this Court who has participated in a decided case involving jury discretion in capital sentencing; (b) introduced a new rule for evaluating mitigating evidence in capital sentencing; and (c) ignored this Court's insistence on informed and guided jury discretion in capital cases. Because the issues decided are central to Eighth Amendment jurisprudence and will surely recur, this Court should grant certiorari.

A. Course of Prior Proceedings

Mr. Graham was tried by a jury and found guilty of capital murder in the 182nd District Court of Harris County, Texas, in 1981. Tr. Vol. I at 63, 70-75. The jury answered "yes" to the statutory special issue questions and the trial judge sentenced Mr. Graham to death as required by Texas law. Id.; see former Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989).

The Texas Court of Criminal Appeals affirmed Mr. Graham's conviction and sentence in an unpublished per curiam opinion on June 12, 1984. See Graham v. Lynaugh, 854 F.2d 715, 716 (5th Cir. 1988). In June, 1987, the trial court scheduled Mr. Graham's execution for July 30, 1987. Id. Mr. Graham sought habeas corpus relief in state postconviction proceedings, and his execution was postponed to permit review of the issues he had raised. Id. The state district court held an evidentiary hearing on January 8, 1988, and later recommended that Mr. Graham be denied relief. Id. The Texas Court of Criminal Appeals adopted the district judge's findings and denied relief on February 19, 1988. Id. at 717.

Mr. Graham's execution had been set for February 25, 1988, and he filed his petition for writ of habeas corpus in federal district court on February 23. Id. That court promptly denied relief and denied a certificate of probable cause to appeal. Id. Mr. Graham immediately appealed to the United States Court of Appeals for the Fifth Circuit and sought a certificate of probable cause. Id. That Court stayed Mr. Graham's execution, received briefs, and heard oral argument. Id. Relying on Jurek v. Texas, 428 U.S. 262 (1976) and this Court's then-recent decision in Franklin v. Lynaugh, 487 U.S. 164 (1988), the Court of Appeals rejected Mr. Graham's claim that the application of the Texas capital sentencing statute in his case violated the Eighth and Fourteenth Amendments by precluding the consideration of relevant mitigating evidence. Graham, 854 F.2d at 718-720.

Concluding that Mr. Graham had made no "substantial showing of the denial of a federal right," the Court of Appeals denied his application for certificate of probable cause. Id. at 723. However, because this Court had recently granted review in Penry v. Lynaugh, the Fifth Circuit stayed Mr. Graham's execution to permit him to petition this Court for certiorari. Id.

In Penry, this Court held that the former Texas capital sentencing statute, under which Mr. Graham was sentenced, unconstitutionally precluded juries in certain cases from considering and giving effect to mitigating evidence as required by the Eighth Amendment. Penry v. Lynaugh, 492 U.S. 302 (1989). In the wake of Penry, this Court vacated the Fifth Circuit's decision in Graham and remanded for reconsideration in light of Penry. Graham v. Lynaugh, 492 U.S. 915 (1989).

A panel of the Fifth Circuit, upon reconsideration, held that, in the informing light of Penry, the Texas special issue questions had not permitted the jury adequately to consider or give mitigating effect to Mr. Graham's youth and troubled family upbringing. Graham v. Collins, 896 F.2d 893 (5th Cir. 1990). Respondent obtained rehearing en banc. Graham v. Collins, 903 F.2d 1014 (5th Cir. 1990).

The en banc court heard oral argument on January 21, 1991, and handed down its decision on January 3, 1992. Its opinion, denying Mr. Graham relief under Penry, commanded a bare 7-6 majority. Appendix A. There were two dissents; in the first, five circuit judges concluded that consistent application of

Penry v. Lynaugh required reversal of Mr. Graham's death sentence. Graham, slip op. at 2028 (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting). In the second dissent, Judge Patrick Higginbotham noted that the majority's reasoning struck hard at the ideal of informed jury discretion in capital sentencing, and thus was inconsistent with the reasoned development of Eighth Amendment principles in this area, including particularly Penry. Id. at 2030 (Higginbotham, J., dissenting). This Petition followed.

B. Statement of facts

Bobby Grant Lambert was shot and killed at a Safeway Food Store in Houston, Texas, on May 13, 1981. S.F. Vol. XVI at 7-9, 66-69. Bernadine Skillern, who had been in the parking lot of the store with her three children at the time of the shooting, had seen a black man struggle with the victim and then fire a gun at him. S.F. Vol. XVII at 233-330. At trial, Ms. Skillern identified the defendant, seventeen-year-old Gary Graham, as the man she had seen shoot Mr. Lambert. Id. at 331.

After the jury returned its verdict of guilty of capital murder, the State presented its case for the death penalty. Tr. Vol. XIX at 74 - Vol. XX at 473. The defense called two mitigation witnesses. Id. at 475-487. First, Mr. Graham's step-father, Mr. Joe Samby, testified that Mr. Graham had always treated him with kindness and respect. Id. at 475. Mr. Samby testified that although young Gary lived with his father at that time, he often visited his mother and always responded eagerly to

requests for help. Id. at 477. For example, Mr. Samby recalled, Gary would cut the yard and help out his mother around the house. Id. In addition, Mr. Samby testified, by the time he was fifteen years old Gary had a job working with his father. Id. at 478. From his earnings, Mr. Samby testified, Gary purchased food and clothing for his own children. Id. at 479.

The second mitigation witness on Mr. Graham's behalf was his grandmother, Ms. Emma Chron. Id. at 481. Ms. Chron told the jury that Gary's mother had been plagued her whole life by mental illness, and that this "nervous condition" had required Gary's mother to seek hospitalization and treatment between twenty and thirty times. Id. at 482-483. As a result of his mother's illness, Ms. Chron explained, young Gary had been frequently moved from one relative's home to another. Id. Despite these constant moves and a consequent lack of parental care and guidance, she added, Gary Graham had gone to church "all the time," because "he loved the Lord," and had never given her any problems when he was in her care. Id. at 485-487.

At closing argument in the penalty phase, defense counsel argued for "compassion" for this "young man" as a "human being." Id. at 489-495. Counsel emphasized Mr. Graham's youth: "A young man, hasn't even reached twenty years old. Not even twenty years old. He goes on a rage for seven days, seven days out of his life. . . . Gary Graham, seventeen years old, went on a rage for seven days." Id. at 492, 494. Because of Graham's youth,

counsel urged, the jury should "find some compassion for that human being," and give him a life sentence. Id. at 495.

Mr. Graham's other defense attorney echoed these same themes:

> [When] you look at a young man of his age, what do you think about? What do you think about the years when you think about death? You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where they're going or what they want to do. . . . You also have to look at changes in society. Changes in ages. . . . When you are 17 to 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. . . . [T]here is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. I'm asking you, ladies and gentlemen, to give the man a chance to live. . . . I ask you for Gary Graham's life.

Id. at 499-504.

In response, the district attorney reminded the jury that they had taken an oath to follow the law, and that the special issue questions were all they were permitted to answer. Id. at 504-510. He argued that Mr. Graham's youth increased the likelihood of his future dangerousness, requiring an affirmative answer to the second special issue:

> Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. And I stand before you now and I ask you on your oath as jurors to follow the law. . . . They ask you to look at his youth. . . . The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? . . . His seeds are death. Pain. Suffering. Humiliation. Degradation. . . . Under the evidence and beyond a reasonable doubt it is the only proper verdict. Yes, special issue number one. Yes, to special issue number two. . . . and the death of Gary Graham.

Id. The jury answered the special issues in the affirmative, and the court sentenced Mr. Graham to death. Tr. Vol. I at 70-75.

REASONS THIS COURT SHOULD GRANT THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT BELOW DISREGARDED THE TEACHING OF PENRY V. LYNAUGH, 492 U.S. 302 (1989), IGNORED WHAT THIS COURT AND ITS MEMBERS HAVE WRITTEN IN MANY CONTEXTS ABOUT THE SIGNIFICANCE OF YOUTH IN CAPITAL SENTENCING, UNDERCUT THIS COURT'S EFFORTS TO DEVELOP PRICIPLES OF GUIDED JURY DISCRETION IN CAPITAL CASES, AND CREATED A STARTLING ANOMALY IN THE APPLICATION OF TEXAS' DEATH PENALTY LAW.

Gary Graham was seventeen years old at the time of the crime for which he waits to die. Almost every member of this Court has recognized, as have many other courts, that the fact of a defendant's youth is a powerfully significant mitigating factor which can, alone, support a sentence less than death. The Court of Appeals, however, held that apart from its relationship to the "deliberateness" of his actions and the probability that he would be dangerous in the future, seventeen-year-old Gary Graham's youth was **"not mitigating,"** and he was not entitled to have the jury consider it in assessing punishment. Graham v. Collins, ___ F.2d ___, slip op. at 2024. The Court of Appeals' conclusion, which commanded only the narrowest of majorities[2], is without support in this Court's Eighth Amendment decisions, and distorts the constitutional principles of jury discretion and individualized sentencing in capital cases. This Court should grant the writ to correct the Fifth Circuit's intolerably

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[2] The en banc Fifth Circuit denied habeas relief by a vote of 7-6, with two judges recently appointed to the Court not participating. See Appendix A.

erroneous misapplication of Penry v. Lynaugh, 492 U.S. 302 (1989), and reverse Mr. Graham's sentence of death.

A. Almost every sitting Justice of this Court who has authored or joined an opinion concerning the effect of youth on the decision to execute an offender has agreed that youth is a mitigating factor.

If a single mitigating factor has been universally recognized as indispensably relevant to the choice between life and death, it is the youth of the defendant. Almost every member of the present Court has acknowledged this basic principle of capital sentencing. For example, In this Court's very first decision reaffirming the constitutionality of capital punishment after Furman[3], Justice Stevens acknowledged that a capital defendant's youth would mitigate against the imposition of the ultimate penalty:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (**e.g., his youth,** ...)

Gregg v. Georgia, 428 U.S. 153, 197 (Stewart, J., joined by Powell and Stevens, JJ., announcing the opinion of the Court). Two Terms later, Justice Stevens again confirmed the centrality of youth as a mitigating factor in the touchstone case of Lockett v. Ohio, 438 U.S. 586 (1978). The Ohio capital setencing statute failed under the Eighth Amendment because it precluded the jury from considering mitigating evidence except as that evidence bore

[3] Furman v. Georgia, 408 U.S. 238 (1972).

on three narrow questions. See Lockett, 438 U.S. at 607. This Court held that scheme unconstitutional because, inter alia, "considerations of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." Lockett, 438 U.S. at 608 (emphasis added).

When a majority of this Court later adopted Lockett's plurality holding, it again specifically emphasized the critical importance of a defendant's youth as evidence mitigating against the death penalty. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court distinguished "the chronological age of a minor" from the attendant infirmities of youth, and held that a constitutional capital sentencing statute had to permit the sentencer to consider and give effect to both. As the Court explained,

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of sixteen years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant. The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the

> background and mental and emotional development of a youthful defendant be duly considered in sentencing.

455 U.S. at 115-116 (all emphases added).[4] Justice O'Connor concurred, noting that the defendant's status as a minor required that the Court take "extraordinary measures" to ensure that his evidence in support of a life sentence be fully and fairly considered. See Eddings, 455 U.S. at 118 (O'Connor, J., concurring).

Three Terms ago, this Court considered whether the Eighth Amendment permitted the execution of seventeen-year-old capital defendants at all; Justice Scalia rested this Court's holding that the Constitution erects no such per se bar on the condition that "individualized consideration is a constitutional requirement [in capital cases],... and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age."[5] Stanford v. Kentucky, 492 U.S. 361,

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[4] See also Eddings, 455 U.S. at 122 (Burger, C.J., dissenting) (noting that trial court had "taken account of Eddings' unfortunate childhood," and did not conclude that "either [Eddings'] youth or his family background was sufficient to offset the aggravating circumstances....") (emphasis added).

[5] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. See, e.g., State v. Valencia, 645 P.2d 239, 241 (Ariz. 1982) ("[youth] is a substantial and relevant factor which must be given great weight"); People v. Frank, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"); Brown v. Francis, 326 S.E.2d 735 (Ga. 1985); Finney v. State, 320 S.E.2d 147 (Ga. 1984); State v. Searcy, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when murder manifested "exceptional depravity," is "sufficient to avoid capital punishment"); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no (continued...)

375 (1989) (emphasis added). Justices White and Kennedy, and the Chief Justice, joined Justice Scalia in affirming this basic principle.

Stanford also makes manifest the Court of Appeals' error in holding that Mr. Graham's youth was "not mitigating" except as it bore on the "deliberateness" of his actions and the likelihood of his future dangerousness.[6]

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[5](...continued)
question but that [the defendant]'s young age at the time of the offense is an important factor in his case that should have been given serious consideration ... at the sentencing phase"); State v. Barber, 753 S.W.2d 659, 669 (Tenn. 1988) (jury was entitled to find defendant's youth mitigating even when he was 29 years old); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (defendant's young age [17] "is a powerful mitigating circumstance"); Moore v. Balkcom, 716 S.W.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating); Hill v. Lockhart, 927 F.2d 340, 343 (8th Cir. 1991) ("[t]he determination whether an individual qualifies as a youth for purposes of mitigating against the death penalty is a subjective one appropriately made by a properly instructed jury"); High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor").

[6] It is important to note that the Court of Appeals did not conclude that, as a matter of fact, the mitigating relevance of Mr. Graham's youth was "outweighed" by the evidence in aggravation (such a conclusion would have been inconsistent with the actual manner in which the former Texas statute operated, but at least would have been grounded in this Court's Eighth Amendment decisions). Instead, the Fifth Circuit held that, as a matter of law, Mr. Graham's age of seventeen was irrelevant except as it tended to disprove one of the "special issue" questions the jury was required to answer. The Constitution forbids such a limitation; see Eddings, 455 U.S. at 113-114.

B. The Court of Appeals' majority validates a sentencing scheme that so unfairly limits jury discretion that no state (including Texas) now permits execution of youthful offenders under so begrudging a standard.

At the time Penry was argued, only Texas and Oregon had capital sentencing statutes as narrowly drawn as the one before the Court. Oregon's highest court has since recognized that Penry dooms their statute. See State v. Wagner, 786 P.2d 93 (Or. 1990) (Opinion on remand from this Court in light of Penry).[7]

The Texas legislature has also responded to Penry, with a new capital sentencing statute that expressly incorporates the concept of jury discretion commanded by this Court's decisions. See, e.g., Boyde v. California, 494 U.S. 370 (1990) (upholding California capital sentencing statute because it permitted the jury to consider all mitigating evidence in determining sentence, including evidence not connected to the crime itself); Hitchcock v. Dugger, 481 U.S. 393 (1987) (striking down death sentence imposed under former Florida statute that limited jury consideration of mitigating circumstances).

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[7] See also State v. Rose, 810 P.2d 839 (Or. 1991) (vacating death sentence under Wagner and Penry); State v. Walton, 809 P.2d 81 (Or. 1991) (same); State v. Pinnell, 806 P.2d 110 (Or. 1991) (same); State v. Stevens, 806 P.2d 92 (Or. 1991) (same); State v. Douglas, 800 P.2d 288 (Or. 1990) (same); State v. Simonsen, 798 P.2d 241 (Or. 1990) (same); State v. Guzek, 797 P.2d 1031 (Or. 1990) (same); State v. Smith, 791 P.2d 836 (Or. 1990) (same); State v. Nefstad, 789 P.2d 1326 (Or. 1990) (same); State v. Montez, 789 P.2d 1352 (Or. 1990) (same); State v. Moen, 786 P.2d 111 (Or. 1990) (same); State v. Miranda, 786 P.2d 155 (Or. 1990) (same); State v. Farrar, 786 P.2d 161 (Or. 1990) (same).

The new Texas statute retains the "special issue" format,[8] but with one vitally important difference: if the jury answers the "aggravating" special issues affirmatively, it must then answer

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's charcter and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Code Crim. Proc. Art. 37.071, § 2 (b) (1), § 2 (b) (2), § 2 (e).[9]

Had Mr. Graham been sentenced under this post-Penry Texas capital sentencing scheme, his lawyer's arguments would have been permitted the dignity and force the Eighth Amendment requires, with instructions focusing the jury's attention on Mr. Graham's mitigating evidence. A reasonable juror could then have voiced her "reascned moral response" to the seventeen-year-old offender by voting to impose a life sentence, rather than the death penalty. This strong inference underscores the injustice

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[8] The current Texas capital sentencing statute in fact retains only the second special issue (the "future dangerousness" question) from the former statute. See Tex. Code Crim. Proc. Art. 37.071 (b) (1) (Vernon's ed. 1992). In cases prosecuted under the law of parties (pursuant to Tex. Penal Code §§ 7.01, 7.02), the new statute poses an explicit Enmund inquiry ("whether the defendant actually caused the death of the deceased or did not actually kill the deceased but intended to kill the deceased or another or anticipated that a human life would be taken"); see Enmund v. Florida, 458 U.S. 782 (1982).

[9] The new statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." Id., § 2 (f) (4).

resulting from the death sentence imposed on Mr. Graham under the regime condemned in Penry.[10]

Thus, even Texas has now repented of the unfairly limited statute under authority of which Mr. Graham is condemned to die. Every State that permits executions has thus, through its representatives and its judges, come to understand the need for informed and guided jury discretion to take account of this most significant determinant of appropriate punishment, and the Texas legislature is only the most recent to revise its capital sentencing statute to comply with the lessons of human experience. Against this array, only the Attorney General of the State of Texas continues to defend the former Texas capital sentencing statute as constitutionally adequate in cases such as Mr. Graham's.

C. The Court of Appeals' majority erred in its conclusion that Mr. Graham's jury could properly be denied the discretion to impose a life sentence based on his mitigating evidence of youth.

The majority of the court below reduced Penry to "addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of the special issues." Graham, slip op. at 2019 (emphasis added). In one fell swoop, the Court of Appeals has thus rewritten Penry (and, in

[10] The opinion of the court below notes some uncertainty concerning the present provisions of the Texas capital sentencing statute, as recently amended to comply with Penry v. Lynaugh, 492 U.S. 302 (1989). See Graham, slip op. at 2001 n.1. Art. 37.071, Tex. Code Crim. Proc. (Vernon's ed. 1992) resolves any question about the state of the law.

turn, Lockett and Eddings) to impose two additional requirements before a Texas capital defendant may claim Eighth Amendment error. First, the Fifth Circuit decreed, the defendant's evidence must have a "major mitigating thrust" that is beyond the scope of the narrow "special issue" interrogatories. Second, the degree by which this "mitgating thrust" exceeds the scope of the special issues must be "substantial."

These additional requirements find no basis in any decision of this Court. The majority seems to have reverted to a pre-Penry understanding of Jurek v. Texas, 428 U.S. 262 (1976), to conclude that habeas relief for Mr. Graham is unwarranted because "no 'major thrust' of any of the mitigating evidence ... is not relevant to support a negative answer to the second special issue." Graham, slip op. at 2019.

In short, according to the majority, Mr. Graham received his constitutional due because all his mitigating evidence -- his youth, and the circumstances of his upbringing -- either (1) was relevant to support a "no" answer to the future dangerousness question, or (2) had no "substantial thrust" beyond those questions. This conclusion is not only at odds with Penry; it ignores the constitutionally-mandated manner in which jury discretion must be guided in capital sentencing.

According to the Fifth Circuit, if a juror believed that Mr. Graham's youth was the reason he committed his offense, that juror could give effect to that conclusion by answering "no" to the "future dangerousness" question. Graham, slip op. at 2024

("whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue"). Conversely, if the juror did not believe that Mr. Graham's youth was the cause of his violent behavior, then Mr. Graham was not entitled to have that juror consider his youth in mitigation, for "youth is not mitigating with respect to conduct not attributable to it." Graham, slip op. at 2024.[11]

This holding requires review in this Court for at least two reasons. The Court of Appeals erred, as dissenting Judge Patrick Higginbotham recognized, because it failed to apply this Court's consistent teaching about informed and guided jury discretion in capital sentencing. This Court has never held that a capital offense must be "attributable" to a defendant's mitigating facts before the constitution entitles him to their full and independent consideration. It is puzzling that Graham cites Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316 (1990), for this proposition.[12] Indeed, Boyde holds the opposite; Boyde upheld the challenged California jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence -- in particular, evidence that was not linked to the commission of the crime:

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[11] The Court of Appeals twice emphasized its rationale: "We reject the contention that ... the jury may believe that youth mitigated the defendant's culpability though not his future dangerousness;" "[t]o the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness." Graham, slip op. at 2024.

[12] See Graham, slip op. at 2024.

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] **allow for consideration of mitigating evidence not associated with the crime itself, such as** the absence of prior criminal activity by a defendant, the absence of prior felony convictions, **and youth.** When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Boyde, 108 L.Ed.2d at 331 (emphasis added).[13] In Boyde, the petitioner had contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." Id. at 327. This Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected.[14]

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[13] This passage from Boyde alone destroys Graham's "attribution" doctrine. Instead, as this Court acknowledged in Boyde, evidence of youth is "mitigating evidence not associated with the crime itself;" that is, the fact of youth has independent mitigating value.

[14] This conclusion follows as well from Justice O'Connor's opinion in South Carolina v. Gathers:

> In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . .

(continued...)

Capital trials are bifurcated so that the guilt/innocence decision is made upon properly limited evidence and instructions. In the punishment phase, the relevancy door swings open much wider. The Court of Appeals' decision would condition relevancy decisions by requiring the defendant to show some extra measure of probative force beyond a rational relationship between his mitigating evidence and the jury's choice between life and death. As we have said, this view finds no support in this Court's decisions. More significantly, the Court of Appeals applies its reasoning to a mitigating factor that every sitting Justice who has written or joined an opinion on the issue, and every State including Texas in its post-Penry statute, recognizes is significant to the jury's capital sentencing decision.

The Court of Appeals also failed to follow Penry by refusing to see evidence of youth as "two-edged" under the former Texas sentencing scheme. Mr. Graham's youth, like Mr. Penry's mental retardation, was a "two-edged sword;" that is, it indicated a

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[14](...continued)
None of this evidence was directly relevant to the events of September 13, 1986 [the date of the crime], but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

Id., 490 U.S. 805, 817-818 (1989) (O'Connor, J., dissenting on other grounds) (emphasis added). The same principle animates this Court's decision in Payne v. Tennessee, ___ U.S.___, 111 S.Ct. 2597, 2608 (1991) (noting that although none of the defendant's mitigating evidence -- including his low IQ, his "affectionate and caring" attitude toward his girlfriend s children, and his parents' account that he was a "good son" -- was related to the circumstances of the offense, he was constitutionally entitled to its consideration by the jury).

likelihood that he would be dangerous in the future, even as it intuitively mitigated in support of a sentence less than death. See Penry, 492 U.S. at 324; cf. Graham, slip op. at 2019 (asserting that the "'major thrust' of any of [Graham's] mitigating evidence" supports "a negative answer to the second special issue"), 2025 n.8 ("We reject Graham's contention in this court that his ... youth itself favored an affirmative answer to the second special issue"). This error has decisive consequences for the majority's ultimate conclusion; given the de minimis quality of the inquiry of the first special issue, see Penry, 492 U.S. at 322-323, it is precisely because Mr. Graham's youth was a "two-edged" sword, and thus could not be given any mitigating effect under the second special issue, that his death sentence must fall.

The Fifth Circuit's conclusion that youth is not "two-edged" in this way is wrong. Mr. Graham's jury was given neither definitions of key terms nor additional instructions to guide its deliberations concerning the second special issue;[15] in the absence of such guidance a reasonable juror could have concluded that Mr. Graham's youth made it at least somewhat more likely that he might commit a criminal act of violence in the future.

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[15] See Jurek, 428 U.S. at 272 (noting that "[t]he Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society'"). Fifteen years after Jurek, the Texas Court still "has yet to define" the terms of the second special issue. This deficiency makes it even likelier that a reasonable juror could have believed that Mr. Graham's youth required an affirmative answer to the "continuing threat" inquiry.

As one judge on the Texas Court of Criminal Appeals itself has recognized,

> ... in answering [the "future dangerousness" inquiry], a jury would decidedly consider the range and severity of the defendant's prior criminal conduct; yet truly "mitigating" evidence -- such as a mental disease or defect, a deprived, abusive childhood or the youth of the defendant -- while mitigating against a death sentence in general, surely has tremendous specific probative weight in favor of answering the future dangerousness question "yes."

Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim. App. 1984), (Clinton, J., dissenting) (emphasis added); see also Eddings, 455 U.S. at 126 n. 8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths do not, in fact, become less violent as they grow older). Because the Fifth Circuit erroneously held the opposite, however, it missed the strongest parallel between Penry and Graham.

Besides refusing to acknowledge that youth is "two-edged" evidence under the former Texas capital sentencing statute as described in Penry, the majority of the court below offered an alternative description of its new rationale limiting the reach of Penry: that evidence of any condition which is, by its nature, transitory could adequately be considered and given effect in answering the second special issue. See Graham, slip op. at 2027 (only evidence of "an essentially permanent adverse change in character (e.g., brain damage)" renders the former Texas statute constitutionally inadequate as applied) (emphasis in original); see also Graham, slip op. at 2028 (Reavley, J., joined by Politz,

King, Davis, and Wiener, JJ., dissenting) (describing this aspect of the majority opinion as "hold[ing] that no instruction or jury decision is needed for transitory circumstances of mitigation").

Simply because a mitigating circumstance is transitory does not render it unproblematic under the former Texas capital sentencing statute. For example, this Court regarded Penry's history of child abuse as mitigating "beyond the scope" of the special issues, since it might have rendered him less able to control his behavior as an adult. Penry, 492 U.S. at 322-323, 324.[16] Yet, it is increasingly evident that the destructive consequences of child abuse, while severe and long-lasting in proportion to the degree of abuse suffered, can be ameliorated -- even cured -- by various therapies.[17] Accordingly, under the rule of Graham, evidence of child abuse would present no problem

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[16] The Fifth Circuit itself recognized as much in its only opinion granting relief under Penry to date: Mayo v. Collins, 920 F.2d 251 (5th Cir. 1990), modifying Mayo v. Lynaugh, 893 F.2d 683 (5th Cir. 1990); cert. denied, ___ U.S.___, 116 L.Ed.2d 225 (1991) (evidence of an abused childhood requires additional jury instruction under Penry).

[17] See, e.g., Hansen, et al., [Treatment of] Victims of Child Physical Abuse, in Ammerman and Hersen, eds., Treatment of Family Violence (1990); Coons, P.M., Child abuse and multiple personality disorder: Review of the literature and suggestions for treatment, 10 Child Abuse and Neglect 449 (1986); Davidson, et al., Treatment of Posttraumatic Stress Disorder with Amitriptyline and Placebo, 47 Gen. Psychiatry 259 (1990); Friedman, Toward Rational Pharmacotherapy for Posttraumatic Stress Disorders: An Interim Report, 145 Am. J. Psychiatry 281 (1988); Famularo, et al., Propranolol Treatment for Childhood Posttraumatic Stress Disorder, Acute Type: A Pilot Study, 142 Am. J. Dis. Child. 1244 (1988).

under Penry, since its effects are at least arguably "transitory."[11]

D. Mr. Graham's jury could not properly be denied the discretion to impose a life sentence based on his mitigating evidence of positive character traits, religious faith, and a troubled family environment.

The evidence presented at Mr. Graham's trial in support of a life sentence was not limited to his young age. During the sentencing phase, witnesses also recounted the troubled circumstances of Mr. Graham's childhood, his devotion to his children, and his religious faith. Tr. Vol. XX at 475-486, 479, 485. This evidence was constitutionally protected mitigating evidence under every decision of this Court from Woodson to date. The court below, however, held that such evidence, "wholly typical of what might be expected in a vast number of cases," had no relevance to the appropriateness of a death sentence for Mr. Graham beyond its probative value in determining his future dangerousness. See Graham, slip op. at 2026-2027. Because such evidence "has no tendency to reduce culpability for the particular crime charged in any way not encompassed within one or more of the special issues," the Fifth Circuit concluded, there was no Eighth Amendment error in the jury's inabilty

[11] This discussion, like that of the "two-edged" quality of youth under the second special issue, see supra, highlights the constitutional deficiency of the second special issue and the reason for that inadequacy: the absence of any definitional instructions guiding the jury in applying such broad concepts as "criminal acts of violence" and "continuing threat to society." (I.e., an instruction defining with clarity and precision the time horizon involved in the prediction of future behavior could solve the problem presented by such "transitory" impairments).

independently to base a life sentence on Mr. Graham's evidence of postitive character traits. Id. This aspect of Graham, like its treatment of Mr. Graham's mitigating evidence of youth, is without support in the decisions of this Court. This Court should grant review to correct this misapplication of Penry and Franklin v. Lynaugh, 487 U.S. 164 (1988).

E. Facts illuminating a capital defendant's background and character are constitutionally protected mitigating evidence, upon which a properly instructed jury could reasonably base a decision to impose a life sentence rather than the death penalty.

Like evidence of youth, evidence of love for one's family, an unsupervised childhood, and religious devotion have all been recognized as constitutionally protected mitigating factors which can justify a life sentence rather than the death penalty. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (evidence that defendant was a "loving uncle" to his nieces and nephews was constitutionally mitigating; jury was required to have a vehicle for independent consideration of such evidence in support of a life sentence); Franklin v. Lynaugh, 487 U.S. 164, 186 (1988) (O'Connor, J., concurring) (noting that "religious devotion," "voluntary servitude," and "acts of kindness" were mitigating, and suggesting that the former Texas statute could be unconstitutional as applied in a case presenting such evidence); see also Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986) (evidence that capital defendant "was a loving son who cared deeply for his mother" constitutionally mitigating).

Considering whether Mr. Graham's mitigating evidence of religious devotion, acts of kindness to his family, and unsupervised upbringing could have been given effect under the former Texas capital sentencing statute, the court below reached two separate conclusions. First, it held that the "principal mitigating thrust" of Mr. Graham's acts of kindness, love and support for his children, and religious devotion "[could] adequately be given effect under the second special issue." Graham, slip op. at 2026 (emphasis added). With respect to Mr. Graham's lack of a structured home environment as a child, the Court of Appeals noted that "[i]n an appropriate context, evidence of this general kind might well form part of a proper Penry presentation," but then rejected Mr. Graham's Eighth Amendment claim because there was no "substantial" evidence of the impact of his broken home upon Mr. Graham's mental and emotional development. Graham, slip op. at 2027. According to this Court's prior decisions, the Fifth Circuit is wrong on both counts.

F. The former Texas special issues denied the jury an opportunity to express its reasoned moral response to Mr. Graham's mitigating evidence of positive character traits and difficult family circumstances.

The Graham court concluded that the mitigating relevance of Mr. Graham's acts of kindness, love and support for his children, and religious devotion was exhausted by their probative value in support of a negative answer to the second special issue. Graham, slip op. at 2026-2027. Graham's holding ignores this

Court's anticipation in Franklin that evidence of "voluntary service, kindness to others, [and] religious devotion" may be relevant to a defendant's moral culpability beyond the scope of the unfocused, undefined "future dangerousness" inquiry. See Franklin, 487 U.S. at 186 (O'Connor, J., concurring).

Mr. Graham's evidence of religious faith and concern for his children could not be given full and independent mitigating weight under the special issues. While these facts about Mr. Graham's character and record arguably may have had some relevance to the "future dangerousness" question, their relevance to the appropriateness of a death sentence is not exhausted by that slender probative value. See Graham, slip op. at 2028-2030 (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting) (noting that the "facts of a defendant's life ... may reach the much broader ultimat_ question: Is death the appropriate response to this human being, considering his moral culpability as a person?"). A reasonable juror could have concluded, given the lack of any guidance concerning the terms of the second special issue, that an affirmative answer was required.[19] Despite this conclusion, however, that same juror could have reasoned that the fact that Mr. Graham had regularly

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[19] This conclusion is compelled by the fact that the testimony at Mr. Graham's trial established that these mitigating factors existed before Mr. Graham committed his capital crime (as must be the case in many capital sentencing hearings). In other words, even if the jury had accepted the testimony of Mr. Graham's mitigating witnesses as entirely true, they would also have had to admit that Mr. Graham had committed acts of violence since those acts of kindness and service, and thus could not give this evidence independent mitigating weight.

attended church, "loved the Lord" and worked hard to provide his children food and clothing made him less deserving of death than a defendant who had never exhibited any such positive qualities -- notwithstanding the likelihood that he might commit a criminal act of violence at some undetermined point in the future. Limited to the special issue questions of the former Texas capital sentencing statute, however, such a juror could not give effect to this conclusion by imposing a life sentence. The statute thus precluded jurors from giving any independent mitigating weight to this evidence of Mr. Graham's valuable human qualities, and from expressing their reasoned moral response to this evidence by voting for a life sentence. The Fifth Circuit's treatment of this evidence is inconsistent with Franklin, Penry, and this Court's other decisions requiring that a capital sentencing jury be permitted to exercise informed, guided discretion in the imposition of sentence.

The Fifth Circuit also held that Mr. Graham's evidence concerning his mother's mental illness, and the circumstances of his upbringing, was not "substantial" enough to implicate the concerns of Penry. Graham, slip op. at 2027. The majority's conclusion, again, ignores the properly discretionary character of the sentencing decision in capital cases, and the indispensable role of mitigating evidence in the reliable and individualized determination of sentence. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 306 (1987) ("[a State] cannot limit the sentencer's consideration of any relevant circumstance that could

cause it to decline to impose the [death] penalty"). Perhaps equally important, common sense suggests that jurors need not be told explicitly that a youth from a broken home, with a mother hospitalized for treatment of her mental illness twenty to thirty times, who as a result was frequently shuttled among relatives, could develop mental and emotional handicaps as a result. The Fifth Circuit's conclusion to to the contrary, see Graham, slip op. at 2027 ("the evidence as a whole is simply not comparable to that in Penry or Eddings") sidesteps the principles of Penry and Lockett. This Court should grant review to address whether a reasonable juror could have determined, based on Mr. Graham's mitigating evidence of positive character traits and an unstructured home environment, that his moral culpability did not justify a death sentence, even if that same juror would have answered both special issues "yes."

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AND ENFORCE THE MANDATE OF LOCKETT, EDDINGS, AND PENRY.

This case presents an opportunity to give the federal courts and the Texas Court of Criminal Appeals needed guidance on the application of Penry v. Lynaugh, 492 U.S. 302 (1989). The Texas Court of Criminal Appeals and the lower federal courts have too often seen Penry as simply a "mental retardation case," without wider implications for the role of guided jury discretion in capital sentencing. In the court below, Judge Patrick Higginbotham's brief dissenting opinion highlights this broader, yet more essential, issue. Judge Higginbotham acknowledges the

tension between the challenge of Furman -- to limit arbitrariness and caprice in the imposition of the ultimate penalty -- and the command of Penry: that the jury be permitted to express its "reasoned moral response" to the defendant and his mitigating evidence in imposing sentence. See Graham, slip op. at 2030-2031 (Higginbotham, J., dissenting). While noting that the jury's sentencing verdict is a "quintessential blackbox decision," yielding to "no logical or explainable divisor," Judge Higginbotham concluded that a properly instructed jury could have determined that, "although Graham acted deliberately, and is likely to do so again, when Graham's tender years and family circumstances are entered in the account of moral culpability, a death sentence is not warranted." Id. at 2031.

Judge Higginbotham's dissenting opinion well illustrates how this Court's decisions requiring jury discretion in capital sentencing are informed by tradition, precedent, and logic. Thus viewed, Penry instructs the States about the need to give jurors ample but guided opportunity to vote against death, having reference always to "the experience of mankind, as well as the long history of our law" as the compass for divining those "diverse frailties of humankind" which may serve as relevant mitigating factors.[20] Penry addresses the application of the Texas capital sentencing statute in such contexts, expressly left open for further discussion by Jurek.

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[20] Goss v. Lopez, 419 U.S. 565, 590 (1975) (Powell, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

In the view of most of the courts which have interpreted it, however, Penry applies only in the most exceptional cases. For example, the Texas Court of Criminal Appeals has reversed only those cases in which evidence of mental retardation was presented as a mitigating factor. See, e.g., Ex Parte Modden, No. 69,442 (Tex. Crim. App. February 12, 1992).[21] Having missed Penry's broader implications concerning jury discretion in capital sentencing, the Texas Court has turned this Court's actual Penry holding on its head -- enforcing a de facto prohibition on the execution of mentally retarded offenders, and failing to acknowledge that evidence of any other mitigating factor, no matter how extensive or compelling, can require resentencing. See, e.g., Lackey v. State, 816 S.W.2d 392 (Tex. Crim. App. 1991) (evidence of "disadvantaged background and emotional and mental problems," including "extremely substandard IQ scores and very

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[21] See also Ex Parte Bell, ___ S.W.2d ___, No. 57,898 (Tex. Crim. App., November 6, 1991); Ex Parte McGee, 817 S.W.2d 77 (Tex. Crim. App. 1991); Ex Parte Goodman, 816 S.W.2d 383 (Tex. Crim. App. 1991); Ramirez v. State, 815 S.W.2d 636 (Tex. Crim. App. 1991). The sole exception is Gribble v. State, 808 S.W.2d 65 (Tex. Crim. App. 1990) (mitigating evidence of psychosexual fantasy which, when combined with drug or alcohol consumption, caused violent behavior, required resentencing under Penry). Gribble today survives only in dissenting opinions; see, e.g., Boyd v. State, 811 S.W.2d 105, 130 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Black v. State, 816 S.W.2d 350, 376 (Tex. Crim. App. 1991) (Clinton, J., dissenting); Ex Parte Earvin, 816 S.W.2d 379, 381 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Ex Parte Baldree, 810 S.W.2d 213, 220 (Tex. Crim. App. 1991) (Baird, J., dissenting).

poor school record" and "a turbulent childhood and troubled relationship with his stepfather," not Penry-problematic).[22]

The lower federal courts have likewise failed to see the constitutional infirmity in the former Texas capital sentencing statute's limitation on the jury's discretion to impose a life sentence based on relevant mitigating circumstances. See, e.g., Graham; DeLuna v. Lynaugh, 890 F.2d 720, 722 (5th Cir. 1989) (denying relief under Penry because "appellant makes no claim that he was abused as a child ... [and] appellant has not shown any evidence of mental retardation"); Wilkerson v. Collins, __ F.2d___, No. 91-2879 (5th Cir. January 6, 1992) (evidence of youth [age 19] not problematic under Penry, citing Graham); Clark v. Collins, ___F.2d ___, No. 92-2036 (5th Cir. January 16, 1992) (adopting district court opinion that evidence of alcoholism and remorse not problematic under Penry); Cordova v. Collins ___ F.2d __, No. 92-2037 (5th Cir., January 21, 1992), slip op. at 2480 (evidence that defendant was "drinking heavily" at the time of the offense, drank frequently, and "act[ed] crazy" when drunk,

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[22] See also Ex Parte Harris (David), ___ S.W.2d ___, No. 71,179 (Tex. Crim. App. December 18, 1991) (evidence of, inter alia, alcoholism not Penry-problematic); Gosch v. State, ___ S.W.2d____, No. 69,726 (Tex. Crim. App. December 18, 1991) (extensive evidence of good character prior to disfiguring accident not Penry-problematic); Mooney v. State, 817 S.W.2d 693 (Tex. Crim. App. 1991) (evidence of religious devotion not Penry-problematic); Black v. State, 816 S.W.2d 350 (Tex. Crim. App. 1991) (extensive evidence of good character including decorated military service in Vietnam, not Penry-problematic); Richardson v. State,___S.W.2d___, No. 68,934 (Tex. Crim. App. June 12, 1991) (evidence of "voluntary service, religious devotion, artistic/poetic talent, family ties, and mental\emotional impairment," not Penry-problematic).

"not the kind of uniquely severe permanent handicap" requiring additional jury instructions under Penry).

This confusion is intolerable and unnecessary. The Graham majority's reasoning cannot be reconciled with Penry's declaration that the Texas special issue questions passed Eighth Amendment muster only if they permitted the jury to fully consider all the mitigating evidence that was relevant to the defendant's background, character, and to the circumstances of the offense. Penry, 492 U.S. at 322. Nor does the Graham majority opinion reflect Penry's concern that the jury be permitted a "reasoned moral response" to the defendant's particular mitigating circumstances in imposing sentence. The Graham dissent accurately charcterized the majority opinion as "modify[ing] Penry for a comfortable fit with Jurek," rather than applying the straightforward reasoning of Penry to the facts of Mr. Graham's case. Graham, slip op. (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting) at 2028. More important, the preclusive limitations on mitigating evidence imposed by the majority opinion in Graham strike not just at Penry, but at the whole rationale of Lockett and Eddings; the contours of the Eighth Amendment requirement of informed and guided jury discretion, and thus individualized sentencing in capital cases, remain unresolved, despite fourteen years of unbroken precedent from this Court.[23] When an en banc Court of

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[23] See Graham, slip op. at 2031 (Higginbotham, J., dissenting) (noting that enforcing the requirement of

(continued...)

Appeals splits almost evenly on an issue of such moment, this Court should intervene.

CONCLUSION

The decision of the court below offends the Eighth Amendment imperative of individualized sentencing in capital cases by limiting the jury's discretion to consider relevant mitigating evidence. Petitioner Gary Graham thus respectfully prays that this Honorable Court grant the writ to review the judgment of the en banc United States Court of Appeals for the Fifth Circuit in his case, and reverse his sentence of death.

Respectfully submitted,

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[23](...continued)
individualized sentencing in capital cases is a "conceptual puzzle").

APPENDIX A

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

Jan. 3, 1992.

State prisoner under death sentence sought habeas corpus. The United States District Court for the Southern District of Texas, David Hittner, J., denied relief. Petition for probable cause was denied by the Court of Appeals, 854 F.2d 715. The United States Supreme Court vacated, 492 U.S. 915, 109 S.Ct. 3237, 106 L.Ed.2d 585. On remand, the Court of Appeals granted habeas corpus, 896 F.2d 893 and rehearing en banc was ordered, 903 F.2d 1014. The Court of Appeals, Garwood, Circuit Judge, held that Texas death penalty statute adequately allowed for consideration of mitigating factors of defendant's youth and of defendant's respect for his family members and support for his children as they were relevant to the special issue of whether defendant would represent a continuing threat to society.

Dismissal of petition affirmed.

Reavley, Circuit Judge, dissented and filed an opinion in which Politz, King, W. Eugene Davis, and Wiener, JJ., joined.

Patrick E. Higginbotham, Circuit Judge, filed a dissenting opinion.

Opinion 896 F.2d 893, superseded.

1. Habeas Corpus ⇐818

Standard for granting certificate of probable cause requires that habeas petitioner make substantial showing of denial of federal right.

2. Criminal Law ⇐1213.8(8)

Imposition of death sentence on 17-year-old convicted of capital murder did not violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐641.13(7)

Trial attorney in state capital murder trial was not ineffective, although defendant contended attorney construe death penalty statute as precluding consideration of mitigating factors; attorney was not in any way discouraged by statute from presenting mitigating evidence of defendant's psychiatric treatment but, rather, his decision not to pursue that course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced. Vernon's Ann.Texas C.C.P. art. 37.071; U.S.C.A. Const.Amend 6.

4. Habeas Corpus ⇐718

Competent evidence supported state court finding that defendant was competent to be executed.

5. Habeas Corpus ⇐773

Habeas petitioner failed to overcome presumption that state trial court's finding that defense counsel was effective was correct. U.S.C.A. Const.Amend. 6.

6. Constitutional Law ⇐270(1)
Criminal Law ⇐1206.1(2), 1213.2(2)
Searches and Seizures ⇐12

Texas death penalty statute provides proportionality and does not violate Fourth, Fifth, Sixth, Eighth or Fourteenth Amendments. U.S.C.A. Const.Amends. 4-6, 8, 14; Vernon's Ann.Texas C.C.P. art. 37.071.

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7. Constitutional Law ⇐221(1, 5), 250.-2(1, 4), 265, 267
Grand Jury ⇐2½
Jury ⇐33(2.1)

Exclusion of 18-year-olds and blacks from grand jury and petit juries in state capital murder trial did not violate defendant's due process and equal protection rights; peremptory challenges against blacks resulted from venireman's testimony that they were opposed to death penalty and no case law suggested that the exclusion of 18-year-olds is unconstitutional. U.S.C.A. Const.Amends. 5, 14.

8. Criminal Law ⇐1208.1(5)

Merely because mitigating evidence has some relevance to a negative answer to one of the special issues submitted to the jury at the sentencing phase under Texas death penalty statute does not necessarily suffice to sustain the application of the statute. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

9. Criminal Law ⇐1206.1(2)

Where no major mitigating thrust of evidence presented at sentencing phase is substantially beyond the scope of the three special issues submitted under the Texas death penalty statute, i.e., whether the conduct was deliberate, whether there is a probability that defendant will commit criminal acts in the future, and whether the defendant was acting in response to provocation, the Texas statutory scheme is valid and allows proper consideration of all mitigating evidence presented. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

10. Criminal Law ⇐1206.1(2)

Mitigating factors of relative youth and evidence reflecting good character traits, such as steady employment and helping others, are adequately covered by second special issue of the Texas death penalty statute which asks the jurors to consider whether there is a probability that defendant will commit criminal acts of violence and will constitute a continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

11. Homicide ⇐357(6)

Evidence of good character or transitory condition, such as youth or being under some particular emotional burden at the time of the homicide, will typically tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is, or may become over time, and will tend to indicate that defendant may be rehabilitated so as not to be a continuing threat to society and such mitigating evidence is adequately accounted for under the Texas death penalty statute by the requirement that the jurors consider likelihood of defendant's future dangerousness. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

12. Homicide ⇐357(6)

Defendant's youth as a mitigating factor in capital murder prosecution was adequately encompassed by special issue asking the jury whether defendant was likely to be a danger to society in the future, and that special issue adequately allowed jury's consideration of that mitigating factor; whatever is mitigating about youth tends to lend support to a "no" answer to that special issue and its tendency to do so is essentially proportional to the degree to which the jury considers that

such factors as youth were influential in defendant's probable conduct. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

13. Homicide ⇐357(4)

Youth is not a factor mitigating against imposition of the death penalty with respect to a defendant's conduct which is not attributable to youth. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

14. Homicide ⇐357(6)

Mild evidence of normal and good character on defendant's part, such as respect for his grandmother and stepfather and his closeness to his mother, his lack of violence, his willingness to help out around the house, and his contribution to the support of his children was related to special issue under Texas death penalty statute of whether there was a probability that defendant would be a continuing threat to society, and statute requiring the jury to answer that special issue adequately allowed for consideration of that mitigating evidence. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

15. Homicide ⇐357(4)

Evidence that defendant's mother was frequently hospitalized with a nervous condition or mental illness from the time that defendant was approximately three years old was not comparable to evidence of a defendant's own mental illness or retardation which might be a mitigating factor not adequately presented to the jury by Texas death penalty statute. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

16. Homicide ⇐357(4)

Defendant's youth, respect for his family, and support of his children had mitigating relevance to special issues under Texas law of whether the conduct of the defendant was committed deliberately and with reasonable expectation that death would result and whether the conduct of defendant was unreasonable in response to any provocation of the deceased. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

Appeal from the United States District Court for the Southern District of Texas.

On Remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

A panel of this Court previously affirmed the district court's denial of Gary Graham's habeas corpus petition challenging his Texas capital murder conviction and death sentence. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir.1988). Thereafter, the United States Supreme Court, in *Graham v. Lynaugh*, 492 U.S. 915, 109 S.Ct. 3237, 106 L.Ed.2d 585 (1989), issued a per curiam order that granted Graham's petition for writ of certiorari, vacated the judgment of this Court, and remanded the case to this Court "for further consideration in light of *Penry v. Lynaugh*," 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Pursuant to that remand order, a panel of this Court reconsidered the case, and, by a divided vote, vacated Graham's death sentence, the panel majority determining that the Texas capital sentencing system was unconstitutionally applied in Graham's case because the jury at the sentencing phase of his trial, having been given no special instructions, was not able to adequately consider and give effect to Graham's youth as a mitigating factor. *Graham v. Collins*, 896 F.2d 893 (5th Cir.1990). Having ordered rehearing en banc, *id.* 903 F.2d 1014 (5th Cir.1990), we have again reconsidered the case in light of *Penry* and, disagreeing with the panel majority's determination in this respect, we now reinstate our former affirmance of the district court's denial of habeas relief.

* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

Procedural History

Over his plea of not guilty, Graham was convicted by a Texas court jury in October 1981 of the offense of capital murder, the May 1981 intentional killing of Bobby Lambert by shooting him with a pistol while in the course of robbing or attempting to rob him. Texas Penal Code, art. 19.03(a)(2). At the sentencing phase of the trial, the jury answered in the affirmative each of the three special issues provided for in Texas Code of Criminal Procedure, art. 37.071(b), and Graham was accordingly sentenced to death.[1] On direct appeal, Graham's conviction and sentence were affirmed by the Texas Court of Criminal Ap-

1. The 1988 and 1990 panel opinions in this case erroneously indicated that only the first two issues specified in art. 37.071(b) were submitted. *See, id.*, 896 F.2d at 898 n. 4 and 854 F.2d at 718.

Until 1991, sections (a) through (e) of art. 37.071 provided, as they did also in 1981, as follows:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

"(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

"(d) The court shall charge the jury that:

"(1) it may not answer any issue 'yes' unless it agrees unanimously; and

"(2) it may not answer any issue 'no' unless 10 or more jurors agree.

"(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life."

The above provisions are the same as when the statute was first enacted in 1973 (except that by 1981 amendment the word "three" was inserted in the opening clause of section (b)).

In May 1991 the Texas Legislature passed two bills amending art. 37.071. S.B. 880, ch. 838, 72nd Leg., R.S.1991, extensively amends the Texas capital sentencing procedure, in-

peals in an unpublished opinion. Graham subsequently sought habeas corpus relief in the Texas courts. After holding an evidentiary hearing on Graham's allegations, the convicting trial court recommended denial of relief, transmitting to the Court of Criminal Appeals findings and conclusions rejecting Graham's contentions. The Court of Criminal Appeals thereafter denied relief pursuant to an unpublished opinion.

Graham then brought the present proceedings under 28 U.S.C. § 2254 in the district court. That court denied relief without an evidentiary hearing, and denied stay of execution and a certificate of probable cause. A panel of this Court granted an interim stay, but ultimately denied Graham's application for certificate of probable cause. *Graham*, 854 F.2d 715. Judge Jolly, in his opinion for the panel consisting of himself and Judges Reavley and King, considered and rejected seriatim each of Graham's several claims. In part IIB of the opinion, the panel dealt with Graham's contention that the Texas statutory special issues, which mandate the death penalty if all are answered affirmatively, *see* note 1, *supra*, do not permit the jury to adequately weigh mitigating circumstances when formulating their answers. *Id.* at 718–20. The factors Graham relied on as mitigating were primarily his youth—he was seventeen at the time of the offense—and certain matters reflected by evidence concerning his childhood.[2] *Id.* The panel relied particularly upon *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), and concluded by holding that "the jury's verdict ... is consistent with the constitutional requirements outlined in *Franklin* and other precedents." *Id.* at 719.[3]

[1–7] Following the Supreme Court's remand for reconsideration in light of *Penry*, the panel again grappled with this difficult issue.[4] Judge Reavley, for the panel majority, held that:

> "The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree." *Id.* at 897.[5]

Judge Jolly, in his 1990 dissent, concluded that the second special issue adequately encompassed any mitigating aspects of youth that the jury must constitutionally be free to consider, as Graham's youthfulness was such a factor only to the extent his offense was a product of it, and youth was necessarily a transitory condition that the jury could fully take into account "by giving a negative answer to the future dangerousness inquiry of the second special issue." *Id.* at 899.

Context Facts

At the guilt-innocence phase of the trial, Graham's defense was essentially only one of insufficient identification. The state presented several witnesses to the shooting, which occurred at about 9:30 p.m. on Wednesday, May 13, 1981, in the parking lot of a Safeway Food Store in Houston, Texas. The perpetrator, a man wearing black pants and a white jacket, bumped into Lambert, who was carrying a sack of groceries out of the store, and attempted to grab Lambert's wallet. Some of the testimony indicated that there was a brief struggle between the two. Lambert pushed at the perpetrator, and each stepped back; the perpetrator produced a

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cluding art. 37.071, and specifies an effective date of September 1, 1991, but is expressly made applicable "only" to offenses "committed on or after September 1, 1991." S.B. 880, § 5. The changes made by S.B. 880 § 1 to art. 37.071 include the entire elimination of the former first and third special issues (the former second special issue is retained verbatim in all cases), provision for a new special issue where the jury charge allowed the defendant to be found guilty under the law of parties, and provision in all cases for the following new special issue:

> "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed."

If all issues submitted are answered adversely to the defendant, the sentence is death; otherwise, the sentence is life imprisonment. S.B. 880 was finally passed May 17, 1991, and was filed without the Governor's signature on June 16, 1991. The other bill, H.B. 9, ch. 652, 72nd Leg., R.S.1991, was finally passed May 27, 1991, and was signed by the Governor June 16, 1991. Section 9 of H.B. 9 provides that art. 37.071 "is amended to read as follows" setting it out in full in the *same* form as it existed previously (or before May 1991) with only minor, technical changes (a new section 1 is added providing that the judge shall sentence the defendant to life imprisonment if the state does not seek the death penalty; the remainder of art. 37.071 is put into its section 2, stated to apply only if the state seeks the death penalty; the only other changes are from "upon" to "on" at the beginning of section 2(a) and using the current designation for the former Texas Department of Corrections in section 2(e)). H.B. 9 specifies September 1, 1991 as its effective date (section 16), and its section 15(a) states: "(a) The changes in law made by Section 1–9 and 11, 12, and 13 of this Act apply to the trial of a capital offense that commences on or after the effective date of this Act, whether the trial is for an offense committed before, on, or after the effective date."

We merely note these 1991 enactments, and express no opinion with respect to whether, for offenses committed on or after September 1, 1991, the controlling form of art. 37.071 is as provided in S.B. 880 § 1 or H.B. 9, § 9.

2. The panel also, among other things, rejected Graham's contention that the Eighth Amendment prohibited execution for an offense committed when the defendant was less than eighteen years old. *Id.* 854 F.2d at 717–718.

3. The 1988 panel did, however, observe (*id.* at 720, n. 8):

> "We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, [487] U.S. [1233], 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925."

4. With respect to the other issues in the case, the 1990 panel opinion observed:

> "In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion." *Id.* 896 F.2d at 894.

We agree, and reinstate this portion of the 1990 panel opinion. For the same reason, we similarly deny relief with respect to Graham's contentions addressed in footnotes 5, 7, and 9 of the 1988 panel opinion. *Id.* 854 F.2d at 718 n. 5, 719 nn. 7 & 9.

5. The 1990 panel majority, though summarizing the evidence presented by Graham respecting his childhood, *id.*, did not address whether that evidence, of itself, would have required some further instruction or jury submission beyond that given. As to the *Penry* issue, the panel only addressed "Graham's age."

pistol, leveled it at Lambert's chest, and shot him in the heart from a distance of about two to three feet. The perpetrator then fled without being apprehended. Lambert staggered back toward the store, fell, and died on the spot. The perpetrator had been observed in the store when Lambert was there, but had left a few minutes before Lambert did. So far as the evidence showed, the perpetrator acted alone. Only one of the witnesses, Mrs. Skillern, was able to identify Graham as the perpetrator.[6] She ultimately so identified Graham in a May 26 photographic display and in a May 27 police station "line-up," as well as in her open court trial testimony. Defense counsel attacked Mrs. Skillern's identification, both by vigorous cross-examination and by emphasizing in argument the failure of the other witnesses, at least one of whom was closer to the events in question, to make an identification.[7] However, no defense evidence was presented. In closing argument defense counsel did not suggest that the evidence failed to show that the offense charged had been committed, but rather that it failed to show that Graham was the one who committed it.

At the sentencing hearing, no evidence was introduced concerning the offense of conviction. The state introduced extensive evidence showing that on five different days during the week following his murder of Lambert, Graham committed robberies at a total of nine separate locations and in each instance Graham leveled either a pistol or a sawed-off shotgun on the victim. The first of these was on May 14, and the last on May 20. These offenses involved some thirteen different victims, including women aged fifty-seven and eighteen and men aged sixty-four, fifty-seven, eighteen, and other ages. With respect to a few of these occasions, the evidence indicated Graham was using marihuana. In addition to money and personal effects, five vehicles were stolen. Two of the victims were pistol whipped, one of them being shot in the neck. These were the only serious physical injuries. Graham glancingly struck another victim, the sixty-four-year-old man, with the vehicle he was stealing, apparently trying to run over him. The fifty-seven-year-old woman was kidnapped and raped, after which Graham fell asleep in her apartment, she contacted the police and he was arrested there, thus bringing his crime spree to an end. On five of these occasions Graham apparently acted alone; on four others an accomplice (not shown to be of a different age from Graham) was present or nearby, but Graham wielded the weapon. At least six of the separate incidents, including that with the sixty-four year old and the two with the fifty-seven year olds, involved Graham practicing initial successful deception on the victim. The state also introduced testimony of a Texas Youth Council employee that she had been familiar since an unspecified time in 1979 with Graham's reputation in the community for being a peaceful and law-abiding citizen, and that it was bad; she gave no elaboration or specifics whatever and did not state how she acquired this information, except that it was not based on her own personal observation. This was the entirety of the state's evidence at the punishment stage.

6. The other witnesses did not testify to anything suggesting that Graham was not (or did not resemble) the perpetrator, but merely stated that they did not get a good enough look at (or sufficiently recall) the perpetrator's face to make an identification.

7. The defense also sought to suppress Mrs. Skillern's testimony on the basis that the photographic display and line-up were unduly suggestive. After an extensive hearing out of the presence of the jury, this motion was overruled.

The only evidence presented by the defense at the sentencing stage consisted of the testimony of Graham's stepfather, Joe Samby, and his grandmother, Erma Chron. Samby testified that he had been married to Graham's mother for about five years, and had known Graham for about five years. He said Graham was fifteen when he (Samby) first met him. Graham lived with his father, and worked with him, but Samby did not know what kind of work Graham did. Graham would come by Samby's house once or twice a week to visit his mother. Graham had "real, real respect for his mother. He cared about his mother. He was real close to his mama." His mother was present in the courtroom, but Samby explained "she can't do nothing because she is on medication and nervous. She is the nervous type." Samby stated that he had never known Graham to be a violent person, that Graham had been "real nice, respectable" with him and, when requested to help out around Samby's house, such as by cutting the grass or to "clean up and help his mother," Graham "would do it and be glad to do it for me." Graham was one of four brothers, and had no sisters. Samby had three children of his own living in his house. Graham had two children, one four and the other two. Graham would "buy ... clothes for his children and try to give them food."[8]

Chron testified that her grandson Graham began staying with her intermittently, beginning "when he was around three," because his mother was frequently hospitalized for a "nervous condition" that Chron said was "mental illness." He would stay with his mother when she was not hospitalized. However, at about age eleven or twelve Graham went to live with his father and "he has been with his father ever since." Graham's mother had been hospitalized "at least twenty times." Chron further stated that while Graham was living with her he attended school, "he would go to church all the time and everything. He loved the Lord," and he didn't give Chron "any problems or trouble." Chron also testified that Graham never had any weapons, and "he has never been violent."

Apart from Samby's testimony that he had known Graham about five years and first knew him when Graham was fifteen, which would indicate that Graham was nineteen or twenty when the offense was committed, there was no evidence before the jury as to Graham's age.[9] Nevertheless, each of Graham's two attorneys, in their closing arguments at the punishment stage, argued to the jury, without prosecution objection, that Graham was seventeen when his offense was committed.

The first defense counsel's argument included the following:

8. There was no evidence as to where Graham's children lived or whether Graham was or had been married.

9. However, it is undisputed that Graham was in fact born on September 5, 1963, this being reflected in a report of a pretrial psychiatric examination filed in the papers of the case in August 1981, the examination having been ordered by the court on motion of defense counsel. Graham was thus seventeen years and eight months of age when the offense was committed. Records of the late May 1981 line-ups at which Graham was identified, which were not before the jury but were put in evidence only in hearings out of the presence of the jury on suppression motions, also reflect that Graham was seventeen at that time.

"We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own.... Gary Graham is a young man. No doubt about it.... A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget.... I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given that opportunity.... Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe...."

Graham's other counsel argued in a similar vein, stating:

"... there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish.... We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above.... because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live...."

The prosecution's argument did not refer to Graham's age in any way except to once acknowledge "his youth." The prosecution stressed Graham's killing of Lambert and his other many serious offenses in the following week, stating in part:

"Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at.... [T]here are certain individuals in our society that we have got to look at. And we have got to realize that are not fit to live with us. The evidence beyond a reasonable doubt shows that Gary Graham is not fit to live in this society, that he will constitute a continuing threat to society. Compassion? They ask for compassion. We ask you for his life.... Rights of the individuals of this society. The life of Bobby Grant Lambert. They say look at his youth. When does a human life taken the way he took that life of Bobby Grant Lambert cease to have meaning? It ceases to have meaning when the terror and the degradation of a man such as him holds that life in his hand.... Compassion? Care? Have you just looked at him? ... Death is the only protection that you, as the jury, and society can protect from people and especially Gary Graham. The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? And where has he sowed those seeds? In the fertile earth? No. He buried Bobby Grant Lambert in the earth. His seeds are death. Pain. Suffering. Humiliation. Degradation. What do those things bring? But one thing tell you what Gary Graham is. You have seen his actions. You have heard from the mouths of these people. Deliberate conduct...."

Neither side made any objections to the other's argument. The court instructed the jury in accordance with article 37.071, including informing them that the sentence would be either "death or confinement in the penitentiary for life," and that in answering the three special issues they could take into consideration all the evidence submitted both at the guilt-innocence stage and at the punishment stage.[10] The three special issues called for by art. 37.071(b) were submitted, and each was answered in the affirmative. Neither side objected to the charge or the issues submitted or requested any other or further instructions or issues.[11]

10. The jury was also instructed that the state still had the burden of proof, which never shifted to the defendant, and that "each special issue submitted must be proved by the state beyond a reasonable doubt" and none could be answered "yes" unless all jurors were convinced beyond a reasonable doubt that it should be so answered.

11. Prior to trial, the court had denied defense counsel's motion to "hold article 37.071 ... unconstitutional and void." This motion was grounded on the contention that the special issues called for were too "vague and indefinite," and thus "allow total discretion to a jury to make unfavorable findings against a Defendant, and such findings may be based on any prejudice the jury may have, individually or as a whole." The supporting memorandum explained that "Article 37.071 leaves with both the judge and the jury a vas[t] residue of discretion which is precisely what the Supreme Court in *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] condemned" and argued that "[c]onsequently, the inquiry [of the article 37.071 issues] is fraught with standardless discretion in the hands of the jury."

There was no suggestion in the motion or memorandum that defendant complained of insufficient discretion (or an insufficient ve-

Discussion

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court sustained the Texas capital sentencing procedure of art. 37.071. This case requires us to examine what, if anything, remains of *Jurek* and art. 37.071 after *Penry*. To provide context for this examination, an overview of some of the other leading decisions of the Supreme Court in this area is appropriate.

Context cases

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Court effectively struck down all capital punishment statutes then in place. The crucial votes in *Furman* were those of Justices Stewart and White, who, as Justice Scalia observed in *Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 3061, 111 L.Ed.2d 511 (1990) (concurring opinion), "focused on the infrequency and seeming randomness" with which the death sentence was imposed under the then existing discretionary system.[12] Following *Furman* some thirty-five states adopted new capital sentencing statutes that reduced or narrowed the sentencer's discretion in determining whether or not to impose the death penalty. The Supreme Court ruled on five of these statutes on July 2, 1976. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek*; *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). *Gregg* sustained the Georgia statute, which directed the sentencer to consider listed and unlisted aggravating and mitigating circumstances, but allowed a death sentence only if at least one listed aggravating circumstance were found. The Court observed that "*Furman* mandates" that the capital sentencer's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *id.* 96 S.Ct. at 2932, and warned against sentencing standards "so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Id.* at 2935 n. 46. *Gregg* goes on to note, however, that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Id.* at 2939. *Proffitt* applied the *Gregg* rationale to uphold the somewhat similar Florida scheme. *Woodson*, however, struck down the North Carolina statute under which the death penalty was made mandatory for

hicle to give effect to it) to determine that the defendant would not receive the death penalty, or that the jury was not given an adequate basis to consider or give effect to its conclusions concerning defendant's age or background. The complaint was indeed the reverse.

12. Justice Stewart, for example, observed that of those convicted of capital crimes "many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed" and that the Constitution could not tolerate systems that "permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 92 S.Ct. at 2762–63. Justice White observed that under the statutes at issue "there is no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." *Id.* at 2764.

first degree murder, in that case murder during the course of robbery. The Court noted that among the "constitutional shortcoming[s]" of this statute was "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant," and that in capital cases the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense." *Id.*, 96 S.Ct. at 2991. *Roberts* applied the same rationale to invalidate the Louisiana statute under which the death penalty was likewise mandatory for first degree murder.

We turn now to *Jurek*, decided the same day. There seven justices voted to uphold the Texas scheme as embodied in art. 37.071, but no opinion attracted more than three votes. The judgment of the Court was announced in Justice Stewart's opinion, which Justices Powell and Stevens joined, and this opinion has generally been understood as expressing the rationale of the Court's action.[13] Justice Stewart's opinion summarizes the facts adduced at trial, including evidence that Jurek "22 years old at the time, had been drinking beer in the afternoon" of the offense, and that he "had always been steadily employed since he had left school and that he contributed to his family's support." *Id.*, 96 S.Ct. at 2954. In describing the Texas sentencing procedure, the opinion states that at the punishment phase the jury is "presented with two (sometimes three) questions, the answers to which determine whether a death sentence will be imposed." *Id.* (footnote omitted). It observes that only the first two issues specified in art. 37.071 were submitted, that both were answered yes, "and the judge, therefore, in accordance with the statute, sentenced the petitioner to death." *Id.* The opinion then quotes verbatim the full text of the three issues specified in art. 37.071, and continues by stating "[i]f the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed." *Id.* at 2955.

In evaluating the constitutionality of the Texas scheme, Justice Stewart notes that under *Woodson* and *Roberts* "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Id.* at 2956. The opinion then observes that "[t]he Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions," and "[t]hus, the constitutionality of the Texas proce-

13. Justice White, in an opinion in which then Chief Justice Burger and then Justice Rehnquist joined, likewise found the Texas statute constitutional. *Id.*, 96 S.Ct. at 2959–60. Justice White's opinion quotes the statutory special issues in full and observes that "[t]he statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *Id.*, at 2959.

Justice White, joined by then Chief Justice Burger, Justice Blackmun, and then Justice Rehnquist, dissented in *Roberts*, *id.*, 96 S.Ct. at 3008–3020, and also in *Woodson*. Justice Blackmun wrote a separate dissent in *Woodson* and did not join Justice White's dissent there. *Id.*, 96 S.Ct. at 2992–93. In *Jurek* Justice Blackmun separately concurred in the judgment, with only a brief reference to his *Furman* dissent. *Jurek*, 96 S.Ct. at 2960. Justices Brennan and Marshall dissented in *Jurek*, as well as in *Gregg* and *Proffitt*, on the grounds that the death penalty was unconstitutional *per se*. 96 S.Ct. at 2971–2977. They concurred in the result in *Woodson*, *id.*, 96 S.Ct. at 2992, and *Roberts*, *id.*, 96 S.Ct. at 3007, on the same basis.

dures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.* The Court proceeds to answer this inquiry in the affirmative, but only with regard to the second—the future dangerousness—special issue, because "[t]he Texas Court of Criminal Appeals has not yet construed the first and third questions ... thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry." *Id.* at 2956 n. 7. In turning to the second special issue, the opinion notes that "[t]he Texas Court of Criminal Appeals has yet to define precisely the meaning of such terms as 'criminal acts of violence' or 'continuing threat to society.'" *Id.* at 2956. It goes on to state (96 S.Ct. at 2956–57):

> "In the present case, however, it [the Texas Court of Criminal Appeals] indicated that it will interpret this second question so as *to allow a defendant to bring to the jury's attention* whatever mitigating circumstances he may be able to show:
>
> "'*In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider* whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age *of the defendant* and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider *whether the defendant was under an extreme form of mental or emotional pressure*, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.' [*Jurek v. State*] 522 S.W.2d [934], at 939–940 [Tex.Crim.App.1975]." (emphasis added).

After briefly considering one other Texas Court of Criminal Appeals decision,[14] Justice Stewart's opinion states "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 2957. The opinion concludes by observing:

> "*By authorizing the defense to bring before the jury* at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.... Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution. *Id.* at 2958 (emphasis added).

Two years later, in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court considered an Ohio death sentence imposed for the murder of a pawnshop operator in the course of an armed robbery of his shop while the defendant, an accomplice, waited outside in the getaway vehicle. Under Ohio law, as the Court construed it, the sentencing judge was required to impose the death sentence for the offense unless he found, by a preponderance of the evidence, one of the three statutory mitigating factors, namely (1) that the victim induced or facilitated the offense, or (2) that the defendant committed the offense under "duress, coercion, or strong provocation," or (3) that it was "primarily the product of" the defendant's "psychosis or mental deficiency." *Id.* 98 S.Ct. at 2959, 2966. "No one planned to kill the pawnshop operator in the course of the robbery." *Id.* at 2957. The presentence report reflected that the defendant, a twenty-one-year-old female, had committed "no major offenses" and that in the opinion of a psychologist her "prognosis for rehabilitation ... was favorable." *Id.* at 2959. The sentencing judge found that the offense was not the product of psychosis or mental deficiency, did not address the other two statutory mitigating factors, and sentenced the defendant to death, stating "that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Id.* The plurality opinion by Chief Justice Burger, joined by Justices Stewart, Powell and Stevens, held that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is inconsistent with the Eighth and Fourteenth Amendments. ... a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 2967. The scope of the plurality opinion is unclear. It focuses on the fact that under the Ohio statute the defendant's lack of specific intent to kill "is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors" and that "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." *Id.* at 2966–67. Similarly, the plurality notes that the Ohio statute's "constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg*, *Proffitt* and *Jurek*," *id.* at 2965, and "the statute now before us is significantly different" than those statutes. *Id.* at 2966. More broadly, however, the opinion states that:

> "... a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. ... that risk is unacceptable and incompatible with the command of the Eighth and Fourteenth Amendments." *Id.*

If the quoted language concerning "independent" mitigating weight is understood in its most apparent literal sense, the *Lockett* plurality would seem to be wholly inconsistent with *Jurek*, for in *Jurek* it is clear that the Supreme Court understood what the Texas statute so obviously facially provides, namely that although a wide range of evidence concerning the defendant's character and record and the circumstances of the offense is to be considered in determining whether or not to impose the death penalty, the consideration of that evidence is not "independent" of such relevance as the jury may find it has to the special issues. But such a construction of *Lockett* is not only much broader than the facts there, but is also at war with the plurality's statement that the Ohio statute was "significantly different" than the Texas enact-

14. The case considered was *Smith v. State*, 540 S.W.2d 693, 696–97 (Tex.Crim.App.1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977), where the Texas court examined the sufficiency of the evidence to support the jury's affirmative answer to the second special issue. *Jurek*, 96 S.Ct. at 2957.

ment and that the former's deficiencies "can best be understood by comparing it with" the valid Texas statute.

Justice Blackmun concurred specially in *Lockett*, "for a reason more limited than that which the plurality espouses," namely that the Constitution forbids imposition of "the death sentence for a defendant who only aided and abetted a murder, without permitting *any* consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Id.* at 2969 (initial emphasis added). Justice Marshall likewise concurred specially, adhering to his view that the death penalty was always unconstitutional, but also observing that the defendant "was sentenced to death for a killing that she did not actually commit or intend to commit" pursuant to "a statutory scheme that precluded *any effective* consideration of her degree of involvement in the crime, her age, or her prospects for rehabilitation." *Id.* at 2972 (emphasis added). Justice White concurred specially, expressly disagreeing with the plurality opinion, but concluding that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." *Id.* at 2983.[15] Then Justice Rehnquist dissented, and Justice Brennan did not participate.

The next significant decision in this context is *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), where the Court struck down a death sentence imposed on a sixteen year old, whom the sentencing judge found posed a continuing threat of violence to society. There, Justice Powell's plurality opinion focused on the fact that the sentencing judge appeared to have determined that "in following the law" he was not permitted to "consider" the defendant's troubled background, the evidence showing the defendant's neglectful and turbulent family environment, excessive physical punishment by his father, that the defendant was emotionally disturbed and his mental and emotional development were at a level several years below his chronological age, and that the offense was a product of these circumstances. *Id.* 102 S.Ct. at 873 & nn. 1 & 2, 877. The opinion also observed that the Oklahoma Court of Criminal Appeals, in reviewing the sentence, had noted that defendant's contention " 'that the killing was in actuality an inevitable product of the way he was raised,' " but held that " 'the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.' " *Id.* at 874. The plurality opinion states that under *Lockett* "the sentencer in capital cases must be permitted to consider any relevant mitigating factor," *id.* at 875, and that "the evidence Eddings offered was relevant mitigating evidence." *Id.* at 877. The rule of *Lockett* was violated because the trial judge "found that *as a matter of law* he was unable even to consider the evidence" and the state appellate court "took the same approach," *id.* at 876, so that "it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf." *Id.* at 877.

Justice O'Connor did not join Justice Powell's opinion, but specially concurred, stating that "the reasoning of the plurality opinion in *Lockett* compels a remand so

15. A modified version of this view subsequently gained majority support. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' " *Eddings*, at 879 (quoting *Lockett*). A remand was necessary for this reason because "it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence." *Id.* Then Chief Justice Burger, joined by Justices White, Blackmun and then Justice Rehnquist, dissented.

In the case *sub judice*, not only was no evidence tendered by the defense excluded, but the trial court's instructions expressly authorized consideration of all evidence admitted in answering the special issues, and, unlike *Eddings*, there is nothing to affirmatively indicate that the jury believed they could not consider any of the evidence for that purpose.

The Court applied *Eddings* in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), to reverse a death sentence because at the sentencing hearing the trial judge had excluded as irrelevant the defense's proffered "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail," and the prosecutor had nevertheless argued to the jury "that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners." *Id.* 106 S.Ct. at 1670. Justice White's opinion for the Court states that under *Eddings* the capital "sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " *Skipper* at 1671 (quoting *Eddings*). Justice White went on to hold:

> "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.' *Jurek v. Texas*, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976).... [E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Id.* (footnote omitted).[16]

Justice Powell, with then Chief Justice Burger and then Justice Rehnquist joined, concurred in the result, conceding that reversal was required on due process grounds because the death sentence had been sought on a factual basis the defendant had not been allowed to rebut, but rejecting the notion that *Eddings* and *Lockett* applied. *Id.* at 1673–1675. Justice Powell—author of the *Eddings* plurality—concluded that the States retained authority "to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance," that these determinations should be respected provided "they do not foreclose consideration of factors that may tend to reduce the defendant's culpability for his crime," *id.* at 1674, and that "States are only bound to consider those factors

16. The opinion concludes that because the excluded evidence was the only evidence from disinterested witnesses tending to contradict the prosecutor's argument, "it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence." *Id.* at 1673.

that are central to the fundamental justice of execution." *Id.* at 1675. Nothing in Justice White's opinion appears inconsistent with these general premises."

In *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), Justice Scalia, for a unanimous Court, reversed a Florida death sentence where the record "could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* 107 S.Ct. at 1824. The defendant had requested that there be taken into account "the testimony concerning petitioner's family background and his capacity for rehabilitation," matters which were not included in the statutory mitigating circumstances. *Id.* at 1824.[18] The Court held that "the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid," citing *Skipper* and *Eddings*. *Id.*[19]

The next year the Court revisited the Texas statute in *Franklin*, where it found no constitutional error in the refusal of a requested jury instruction that any of the special issues could be answered negatively "if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty." *Id.* 108 S.Ct. at 2325 & n. 4. The only mitigating evidence was that defendant's prison service for several years both before and after the offense was without any disciplinary incident. *Id.* at 2324. Justice White's plurality opinion, joined by the Chief Justice and Justices Scalia and Kennedy, observed that "the Texas courts have expressed resolute adherence to *Lockett*" in the decade since it was decided, *id.* at 2326, and rejected the contention, based on the "'independent' mitigating weight" language of *Lockett*, that defendant's "prison disciplinary record reflected so positively on his 'character' that the instructions ... should have provided the jury with a 'mechanism through which to impose a life sentence' even if the jury otherwise believed that both Special Issues should have been answered 'yes.'" *Id.* at 2329. Justice White also expressly rejected the claim that the Constitution required that the jury, even if it answered the special issues affirmatively, be "still entitled to cast an 'independent' vote against the death penalty," stating that "this submission is foreclosed by *Jurek*, which held that Texas could constitutionally impose the death penalty if a jury returned 'yes' answers to the two Special Issues" and that "*Jurek* has not been overruled; and we are not inclined to take any such action now." *Id.* at 2330. The plurality opinion asserts that "*Lockett* does not hold that the state has no role in structuring or giving shape to the jury's consideration of ... mitigating factors," *id.*, and that "we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused." *Id.* at 2331. Recognizing that "two lines of cases"—*Eddings* and *Lockett* on the one hand and *Gregg* and *Proffitt* on the other—"are somewhat in 'tension' with each other," Justice White notes that nevertheless "the Texas capital sentencing system has been upheld by this Court ... precisely because of the way in which the Texas scheme accommodates *both* of these concerns." *Id.* He continues by stating:

> "Doubtlessly this is why this Court originally approved Texas' use of Special Issues to guide jury discretion in the sentencing phase, notwithstanding the fact—expressly averted to in the plurality opinion for the Court—that mitigating evidence is employed in the Texas scheme *only* to inform the jury's consideration of the answers to the Special Issue questions." *Id.* (emphasis added).

Justice Stevens, joined by Justices Brennan and Marshall, dissented, concluding the defendant's evidence of freedom from disciplinary violations during several years of imprisonment was relevant as mitigation in respects other than simply as it bore on his future dangerousness. Such evidence indicated "that petitioner's character was not without some redeeming features" and that he "may have virtues that can fairly be balanced against society's interest in killing him in retribution for his violent crimes," *id.* at 2335, and, by suggesting that his commission of the offense was "not in keeping with his ... usual qualities or traits," bore on his "culpability" for the offense as well as on his future dangerousness. *Id.* at 2336. Justice Stevens concluded that absent some special instruction such as the defendant had requested "it is probable that the jury misapprehended the significance it could attach to mitigating evidence that was descriptive of petitioner's character rather than predictive of his future behavior." *Id.* at 2337. This in Justice Stevens' view rendered the sentence invalid under *Lockett* and *Eddings* and related cases.

Justice O'Connor, with whom Justice Blackmun joined, specially concurred. *Id.* at 2332-2335. She considered *Lockett*, *Eddings* and *Hitchcock* as standing for the proposition that "punishment should be directly related to the personal culpability of" the defendant, and she concluded that "a state may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty." *Id.* at 2333. In Justice O'Connor's view, the evidence of defendant's good conduct in prison "had no relevance to any other aspect of petitioner's character" than his future dangerousness. *Id.* Hence, no special instruction was required. Justice O'Connor contrasted "[t]he limited probative value" of that particular mitigating evidence to "[e]vidence of voluntary service, kindness to others, or of religious devotion [which] might demonstrate positive character traits that might mitigate against the death penalty." *Id.* Her opinion also states:

> "If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or *that had*

17. Indeed, Justice White's opinion indicates evidence such as that of good personal hygiene practices while in prison might properly be treated as irrelevant. *Id.* at 1672 n. 2.

18. The Florida statutory mitigating circumstances as set out in the opinion, *id.* at 1823 n. 3, did not include potential for rehabilitation or lack of future dangerousness or any analogous consideration (nor any general or residual mitigation category). Nor did they include matters such as troubled family history or turbulent upbringing (here, evidence that as a child the twenty-year-old defendant had the habit of inhaling gasoline fumes, as an apparent result of which his mind tended to wander, and that he was one of seven children of a poor family whose father died of cancer), although they did include whether the crime was committed while "under the influence of extreme mental or emotional disturbance" and whether defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was "substantially impaired." The opinion contains no discussion whatever of the possible relevance of these latter factors to the "family background" claims of petitioner.

19. The opinion observes that no harmless error argument was made.

relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. If this were such a case, then *we would have to decide whether* the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." *Id.* (emphasis added).

However, Justice O'Connor did not expressly proffer an answer to that question.

Penry

At long last, we turn to the crucial decision in *Penry*. There the evidence showed that the defendant, 22 years old and on parole from a prior rape conviction at the time of the charged offense, "suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and in inability to learn from experience." *Id.* 109 S.Ct. at 2941. The brain damage was likely present from birth, "but may have been caused by beatings and multiple injuries to the brain at an early age." *Id.* Penry's mother had "frequently beaten him over the head with a belt when he was a child," and he was "routinely locked in his room without access to a toilet for long periods of time." He "was unable to learn in school and never finished the first grade." Until age twelve, Penry "was in and out of a number of state schools and hospitals." *Id.* Thereafter, it took him over a year to learn to print his name. *Id.* at 2942. The two psychiatrists testifying for the State both opined that Penry was sane, but they also acknowledged his "extremely limited mental ability, and that he seemed unable to learn from his mistakes," one indicating that Penry had "an inability to learn from experience and a tendency to be impulsive and to violate society's norms." *Id.* Defense counsel unsuccessfully objected to the sentencing charge on several grounds, including its failure to define "deliberately" as used in the first special issue, its failure to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances," and its failure to condition a death sentence on a determination "that any aggravating circumstances ... outweigh any mitigating circumstances." *Id.* At sentencing, defense counsel argued, among other things,

> "that if a juror believed that Penry, because of the mitigating evidence of his mental retardation and abused background, did not deserve to be put to death, the juror should vote 'no' on one of the special issues even if it believed the State had proved that the answer should be 'yes.'" *Id.* at 2950.

In response, the prosecutor noted that the defense counsel had not argued the special issues or shown how the state had failed to meet its burden of proof on them.

The Court, in an opinion by Justice O'Connor, joined in this respect by Justices Brennan, Marshall, Blackmun and Stevens, set aside the death sentence, concluding:

> "In light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.*[20]

20. Justice Scalia, joined by the Chief Justice and Justices White and Kennedy, dissented from this holding. *Id.* at 2963-68.

Justice O'Connor first determined that the rule Penry sought to establish—that where evidence of the defendant's "mental retardation and abused childhood ... is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence"—was not a "'new rule'" for purposes of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), "because it is dictated by *Eddings* and *Lockett*." *Penry* at 2947. The opinion goes on to explain that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* at 2947. Quoting her concurring opinion in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987), Justice O'Connor states that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" and that a capital sentence "'should reflect a reasoned moral response to the defendant's background, character, and crime.'" *Penry* at 2947. Penry's contention is again described as being that the Texas statute was applied in a manner "precluding the jury from acting upon the particular mitigating evidence he introduced." *Id.* Yet again, his claim is characterised as follows:

> "Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence." *Id.*

The opinion goes on to explain this conclusion. Respecting the first special issue, the opinion, though suggesting some doubt about the matter, assumes, *arguendo*, that "'deliberately'" was understood by the jury in this connection to mean "something more than" simply "'intentionally'" (which had already been established by the guilty verdict). *Id.* at 2948. It concedes that "Penry's mental retardation was relevant ... to whether he was capable of acting 'deliberately.'" *Id.* at 2949. Nevertheless, "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" A "rational juror" could have concluded "in light of Penry's confession" that he "deliberately killed ... to escape detection."[21] However, "that same juror

Justice O'Connor's opinion also held that the Constitution did not prohibit execution of the mentally retarded, although recognizing that that issue was within the first exception to the doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), barring retroactive habeas application of new rules. *Id.* at 2952-2958. All Justices concurred in the *Teague* aspect of this holding; but Justices Brennan, Marshall, Blackmun and Stevens dissented from the substantive holding, *id.* at 2958-2963, while the Chief Justice and Justices White, Scalia and Kennedy agreed with it (although disagreeing with a portion of Justice O'Connor's reasoning in this respect). *Id.* at 2963-64. This aspect of *Penry* is not implicated in our present consideration of the case *sub judice*.

21. The opinion does not detail the content of the confession. However, it is described in the opinion of the Court of Criminal Appeals on direct appeal, *Penry v. State*, 691 S.W.2d 636 (Tex.Crim.App.1985), *cert. denied*, 474

could also have concluded that Penry"—because his "mental retardation" made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," and "because of his history of childhood abuse"—"was less morally 'culpable than defendants who have no such excuse,' but who acted 'deliberately' as that term is commonly understood." *Id.* Thus, in the absence of a sufficiently broad definition of deliberately "we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.* [21]

As to the second special issue dealing with future dangerousness, Justice O'Connor observes that Penry's mitigation evidence "is relevant *only* as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." *Id.* at 2949 (initial emphasis added). She continues by stating that the evidence of Penry's "mental retardation and history of abuse," though diminishing his blameworthiness, "indicates that there is a probability that he will be dangerous in the future," and then quotes with approval from Judge Reavley's opinion for this court in that case, including the following:

> "'If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a *major thrust* of Penry's evidence as *mitigating* evidence.' 832 F.2d at 925 (footnote omitted) (emphasis in original)." *Id.* at 2950 (initial emphasis added).

Justice O'Connor then turns briefly to the third special issue, concerning whether the killing "was unreasonable in response to the provocation, if any, by the deceased." Although the opinion recites the evidence supporting the affirmative answer to this issue,[22] it does not expressly say or even suggest that the mitigating evidence had any relevance to the question (nor does it recite that the State asserted any such relevance). *Id.* at 2950.

Justice O'Connor concludes that resentencing is required because "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to" the evidence of Penry's "mental retardation and abused background" in "rendering its sentencing decision." *Id.* at 2952.

[8] *Penry* clearly stands for the proposition that merely because the mitigating evidence has *any* relevance to a negative answer to one of the special issues does not necessarily suffice in all cases to sustain application of the Texas statute. Penry's evidence had *some* such relevance to the first issue. The more difficult question is whether the Texas statute can operate as written in any case where the mitigating evidence, though all clearly relevant to support a negative answer to one or more of the issues, nevertheless also has *any* mitigating relevance *whatever beyond* the scope of the special issues. *Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can *also* fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the issues. That, indeed, was the case in *Penry*, where as to the third issue the mitigating evidence was all essentially irrelevant, as to the second issue it was *only* affirmatively harmful to the defense, and as to the first issue its favorable relevance was essentially minor but its "major thrust" was beyond the scope of the issue (see notes 21 and 22 *supra*).

[9] We conclude that *Penry* does not invalidate the Texas statutory scheme, and that *Jurek* continues to apply, in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues. That is particularly appropriate in a case such as this, where there is no "major thrust" of any of the mitigating evidence which is not relevant to support a negative answer to the second special issue, the only special issue which *Jurek* addressed. Any other holding, it seems to us, would effectively render *Jurek*, and the Texas statutory scheme which it sustained, dead letters.

It is a commonly accepted truism that, just as *none* of us is *all* good, so also *none* of us—not even those who will probably commit criminal acts of violence constituting a continuing threat to society—is *all* bad. The number of capital crime defendants who have *nothing* in their background which might tend to reflect a positive character trait—who have *never* performed *any* voluntary service or exhibited *any* kindness to others or supported their family, to mention but three possible examples—must be miniscule at most. And this, of course, has been obvious all along. So too has it always been obvious that many defendants—because of some transitory condition such as relative youth or emotional distress incident to one of life's many crises to which all are subject such as divorce or loss of a loved one or a job—may, when they committed an offense, have been less able than those not so afflicted to control themselves and evaluate their conduct and its consequences. If *Penry* is read broadly, then in none of these cases can the Texas statutory scheme pass muster. Every one of these cases—the case where a month previously the defendant broke up with his girl friend or

U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986), as reflecting that Penry "had been planning for months to rape somebody and that in the three weeks prior to the instant offense appellant had focused on the deceased and [another] as possible victims," *id.* at 653, that on the morning of the offense when he decided to go to the victim's house (where he forced his way in) and rape her "I knew that if I went over to the chick's house and raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen," *id.* at 641, 652–53, and that while the victim was lying helpless on the floor following the rape "I came back and sat on her stomach. I told her that I was going to kill her and that I hated to but I thought she would squeal on me." *Id.* at 641.

The opinion of Justice Clinton, concurring in the result on the direct appeal, espouses the view that the failure to define "deliberately" was error (the majority held it was not error), but that the error was harmless "due to the fact that the evidence of 'deliberateness' was uncontested, overwhelming and in large part gleaned from appellant's written admissions." *Id.* at 657.

22. Judge Reavley, writing for the court in our consideration of *Penry*, observed concerning the deliberateness issue:

> "Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that [the first] issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, *a major thrust* of the evidence of his background and child abuse, logically, does not." *Penry v. Lynaugh*, 832 F.2d 915, 925 (5th Cir.1987) (emphasis added), *rev'd, Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

23. "Penry's own confession indicated that he ... killed her after her struggle had ended and she was lying helpless." *Id.* at 2950. *See also* n. 21 *supra* (indicating that killing was to avoid detection and was contemplated for this purpose from the beginning).

lost his job, the case where as a youth the defendant volunteered to mow a neighbor's yard or was in his early twenties when the offense was committed, and all the others—would demand some other system of sentencing trial. The Texas statutory scheme would be essentially meaningless and *Jurek* would have in substance been overruled.

We doubt that the Supreme Court intended this. Not only has the Court not expressly overruled *Jurek*, but to the contrary it has cited *Jurek* with approval numerous times. As an early example, in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court noted that *Jurek* upheld the Texas statutory scheme which "mandates a sentence of death" if the three "statutory penalty questions" are answered affirmatively, *id.* 100 S.Ct. at 2524 n. 1, and observed that Texas could properly ensure that its capital case jurors "be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias," while nevertheless recognizing that "jurors under the Texas '... procedure unavoidably exercise a range of judgment and discretion while remaining true to their oaths." *Id.* at 2527. *See also Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). As we have previously noted, *Lockett* states that the deficiencies of the Ohio statute "can best be understood" by comparing it to, *inter alia*, the "significantly different" Texas statute which *Jurek* upheld. *Lockett*, 96 S.Ct. at 2965, 2966. While the *Eddings* plurality does not cite *Jurek*, many decisions of the Court since then have. We have noted the prominence given to *Jurek* in *Skipper*, 106 S.Ct. at 1671. Other post-*Eddings* decisions citing *Jurek* with approval include *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 554–55, 98 L.Ed.2d 568 (1988); *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2721, 97 L.Ed.2d 56 (1987); *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 876, 879, 79 L.Ed.2d 29 (1984) (declining to "effectively overrule *Jurek*"); *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3453–54, 77 L.Ed.2d 1171 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2742 n. 13, 77 L.Ed.2d 235 (1983). The *Franklin* plurality relied principally on *Jurek* and observed that the Texas "method for providing for the consideration of mitigating evidence has been cited repeatedly with favor." *Id.* 108 S.Ct. at 2331 (footnote omitted). Neither the *Franklin* concurrence nor *Penry* purports to jettison *Jurek*. Although *Penry* clearly makes an exception to *Jurek*, it gives no express indication that the exception made is conceived of or recognized as being vastly broader than the rule itself, or that *Jurek* and the Texas scheme will thereafter remain valid only in the very rarest of cases.

Since *Penry*, the Court has continued to cite *Jurek* with approval. Thus, the Chief Justice's opinion in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 1081–82, 108 L.Ed.2d 255 (1990), joined in by Justices White, O'Connor, Scalia and Kennedy, describes *Jurek* and the Texas system in a way which obviously would be wholly inappropriate if either were viewed as still valid in no more than a small minority of cases. The same can be said for the opinion of Justice Kennedy, joined in by the Chief Justice and Justices White, O'Connor and Scalia, in *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 1261–62, 108 L.Ed.2d 415 (1990),

the here pertinent language of which is quoted in the margin.[24] Plainly, Justice Kennedy regards *Penry* as the exception to *Jurek*, not *Jurek* the exception to *Penry*.

Moreover, as Justice Kennedy points out in *Saffle* (see note 24, *supra*), a broad reading of *Penry* is inconsistent with *Penry*'s holding that its result was "dictated by" *Lockett* and *Eddings* for purposes of *Teague*.

Similar considerations require rejection of any notion that a broad reading of *Penry* is consistent with *stare decisis* because the Texas courts have not kept the "assurance" of *Jurek*, or the Texas scheme is really different than it appears on its face or had been described by the Texas courts prior to the Supreme Court's decision in *Jurek*. The opinion in *Jurek*—rendered the same day as *Woodson* required "particularized consideration of relevant aspects of the character and record of each convicted defendant"—explicitly recognizes that the Texas jury is only allowed to answer "yes" or "no" to three statutory questions and that if these are answered "yes" the death penalty is automatic. The exact wording of the questions is reflected in the Court's opinion. The Court holds that the issue is whether these specific "enumerated questions allow consideration of particularized mitigating factors." *Id.* at 2956. The Court gives an affirmative answer *not* on the basis of any assumed special instructions or definitions being given to the jury, but rather *entirely* on what *evidence* the Texas courts have said may be brought before and considered by the jury *in answering* the second (future dangerousness) question. Thus, the Court relies on the Texas court opinion which it describes as interpreting "the second question to allow *a defendant to bring to the jury's* attention whatever mitigating circumstances he may be able to show.". *Id.* (emphasis added). The Court next quotes the Texas court's language in which it says "the jury could consider" various items of evidence—including matters such as presence or absence of past criminal conduct, "age of the defendant" and "mental or emotional pressure"—*"[i]n determining the likelihood*

24. Justice Kennedy's opinion states:

> "To the extent that Penry's claim was that the Texas system prevented the jury from giving *any* mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. *Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting....
> "Penry's claim, moreover, did not ask us to apply the reasoning of *Lockett* and *Eddings* so much as it required us to apply our decision in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *Penry* interpreted *Jurek* as holding that the Texas death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant.... Having thus construed *Jurek*, we concluded that resolution of Penry's claim that 'those assurances were not fulfilled *in his particular case*,' 492 U.S., at [318], 109 S.Ct., at 2947 (emphasis in original), did not involve the creation of a new rule.... *Penry*, ... must be understood in terms of the Court's ruling in *Jurek*, and its application in later cases. We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek*...." *Id.* 110 S.Ct. at 1261–62 (initial emphasis added).

Justice Kennedy goes on to cite *Jurek* as an example of "our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Id.* 110 S.Ct. at 1262.

that the defendant would be a continuing threat to society." *Id.* (emphasis added). The Supreme Court then says "[b]y authorizing *the defense to bring before the jury* ... whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 2958 (emphasis added). This "assurance" has not been broken or even slightly bent, but on the contrary has been fully performed. Texas has continued to interpret its sentencing statute just exactly as the Supreme Court in *Jurek* assumed it would.

[10] The Supreme Court's opinion in *Jurek* reflects that the defendant there was twenty-two years old, had been drinking beer earlier in the day of the offense, and had been steadily employed and contributed to his family's support. *Id.* at 2954. At the very least, *Jurek* must stand for the proposition that these mitigating factors—relative youth and evidence reflecting good character traits such as steady employment and helping others—are adequately covered by the second special issue. *Penry* cannot hold otherwise and at the same time not be a "new rule" for *Teague* purposes. The decisions in *Eddings* and *Lockett* do not justify a contrary conclusion, as *Saffle* says "[w]e did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather" these cases "reaffirmed the reasoning in *Jurek*." *Saffle* at 1262.

[11] We believe that what *Penry* represents is a set of atypical circumstances of a kind that, quite understandably, neither the Texas Court of Criminal Appeals nor the Supreme Court in *Jurek* had in mind, namely circumstances where the defense's mitigating evidence would have either no substantial relevance or only adverse relevance to the second special issue. Typically, evidence of good character, or of transitory conditions such as youth or being under some particular emotional burden at the time, will tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is or may become over time, and that the defendant may be rehabilitable so as not to be a continuing threat to society. The core of *Jurek*—which we cannot conclude has been abandoned—is that the mitigating force of this kind of evidence is adequately accounted for by the second special issue. But in *Penry* the Court was faced for the first time with a wholly different type of mitigating evidence. Not evidence of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but *nonetheless* evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue. To recognize that, as *Penry* did, is not necessarily to deny the validity of *Jurek* as it applies to the more typical case.

We conclude that the core of *Jurek* remains intact, and we now apply it to the circumstances *sub judice*.

Youth

[12] The primary mitigating factor which Graham urges was not adequately encompassed in the special issues is his youth. We disagree.

For at least five years before Graham's trial, it was established Texas law that the jury, in answering the second special issue, could consider "the age of the defendant." *Jurek v. State*, 522 S.W.2d 934, 940 (Tex.Crim.App.1975), *aff'd sub nom. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Since then, the Texas decisions have consistently followed this rule. For example, in *Roney v. State*, 632 S.W.2d 598 (Tex.Crim.App.1982), the Court of Criminal Appeals, noting that the defendant was seventeen and that "the age of the defendant" was "relevant in deciding the second punishment issue," *id.* at 601, held that considering the entire record, including the defendant's "young age," the evidence was insufficient to support the jury's affirmative answer to the second issue. *Id.* at 603. *See also, e.g., Robinson v. State*, 548 S.W.2d 63, 64 (Tex.Crim.App. 1977); *Earvin v. State*, 582 S.W.2d 794, 798–99 (Tex.Crim.App.1979); *Brasfield v. State*, 600 S.W.2d 288, 293 n. 3 (Tex.Crim. App.1980); *Keeton v. State*, 724 S.W.2d 58, 61 (Tex.Crim.App.1987).

The Supreme Court's opinion in *Jurek* affirmatively reflects that the defendant was "22 years old at the time" of the offense, *id.* at 2954, and, in upholding the death sentence and the Texas scheme, quotes the portion of the Court of Criminal Appeals' opinion stating that in answering the second issue the jury can consider "'the age of the defendant.'" *Id.* at 2957. *Jurek* thus squarely answers the question of whether "youth" is adequately taken into account by the second special issue. If *Penry* compels a different result, it would have been a new rule for purposes of *Teague*, as *Saffle* makes clear. Indeed, if *Jurek* may not apply to the very type of case that was then before the Court, it has been overruled. But, as noted, the Supreme Court has not so treated it. Moreover, *Penry* itself involved a twenty-two-year-old defendant, *id.* at 2941, and the opinion contains no suggestion whatever that this fact was one which could not be adequately taken into account in answering the statutory special issues.[25]

25. Nor can we accept the notion that twenty-two is not youthful for purposes of any constitutionally mandated rule that the capital sentencer must be able to take into account the defendant's "youth" at the time of the offense. Texas clearly regards those in their early twenties as youthful for this purpose. *See, e.g., Lackey v. State*, — S.W.2d —, — (Tex.Crim.App.1991) (describing as a mitigating circumstance "youthful age (23) at the time of the offense"); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991) ("There is also mitigating evidence of appellant's youth; appellant was twenty-one years old at the time of the offense"); *Madden v. State*, 799 S.W.2d 683, 684 (Tex.Crim.App. 1990) ("Appellant, however, introduced substantial mitigating evidence. He was only twenty-one years old at the time of this offense"). The salient factors which make "youth" mitigating—principally inexperience with resultant diminished judgment and self-control—are all generally present among those in their early twenties, albeit to a lesser degree than in those still younger. And this, indeed, is the approach taken by Graham's counsel, as reflected in his statements in closing argument (see note 28 *infra; see also* text at note 9 call *supra*). We do not believe that for this purpose a categorical distinction is proper based on some specific age, such as eighteen, which is often the age of majority (in Texas minors are those under eighteen who have never been married; Tex. Probate Code § 3(t)) or the minimum age for purposes of engaging in certain conduct (cf. U.S. Const.Am. XXVI). The Supreme Court rejected such an approach in holding that the Constitution does not forbid the death sentence for offenses committed at age sixteen or seventeen. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Since *Penry*, the Texas Court of Criminal Appeals has continued to hold that the second special issue provides an adequate vehicle for the jury to take into account the defendant's youth. *See Ex parte McGee*, 817 S.W.2d 77, 80 (Tex.Crim.App.1991); *Lackey v. State*, — S.W.2d — (Tex.Crim.App.1991); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). We, too, appear to have recognized this. *See DeLuna v. Lynaugh*, 890 F.2d 720, 722 (5th Cir.1989) (evidence that defendant was twenty-one when offense committed would not bring him within *Penry*).

As the panel majority and dissent each correctly recognized, youth is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory. *Graham*, at 898, 899. Therefore, whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to society. Thus, the second special issue affords an adequate vehicle by which the jury can give effect to the mitigating aspect of youth.

[13] We reject the contention that the second special issue is inadequate for this purpose because the jury may believe that youth mitigated the defendant's culpability though not his future dangerousness. But youth is not mitigating with respect to conduct not attributable to it. Thus, *Penry* says that evidence of a defendant's background and character is relevant because "'defendants who commit criminal acts that are *attributable to* a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Id.* at 2947 (quoting Justice O'Connor's concurrence in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)) (emphasis added). *See also Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 1199, 108 L.Ed.2d 316 (1990) (same).[26] To the extent that Graham's criminal conduct was a product of his youth he was for that reason not only less culpable but, to the same extent, also less likely to be dangerous when no longer young. To the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness. Nothing in the present record suggests that the jury here might have

Moreover, such an approach would be at war with the concept of individualized capital sentencing which underlies *Penry*. It is common knowledge that individuals develop and mature at different rates, and it will frequently be the case, for example, that one eighteen and, say, two months, is actually less "mature" and more "youthful" than another who is seventeen and eight months a seventeen year old simply because the offender was seventeen, and regardless of whether the offense was to any extent attributable to his youth. However, such a conclusion is not based on individualized consideration of the offender but merely on a characteristic which is *precisely* the same for him as for every other human being who attains that age, and as such amounts to no more than disagreement with the Texas law which allows execution of seventeen year olds for capital murder.

26. It is true that a hypothetical juror might conclude that death is always an inappropriate penalty for capital murder committed by

viewed the matter in any other light.[27]

Finally, the evidence here, and the manner in which the case was approached and tried in this respect, do not suggest any special factor or circumstance militating against application of what we conceive to be the appropriate general rule, namely that the mitigating force of the defendant's youth at the time of the offense may be adequately taken into account in answering the second special issue. In marked contrast to *Penry*, there is here nothing to suggest that defense counsel desired to have the mitigating force of youth presented or considered in any other manner than as a basis for a negative answer to the second special issue.[28] *Cf. Lowenfield*, 108 S.Ct. at 552 (even where absence of objec-

27. Moreover, to say that the second special issue is for this reason inadequate to take youth into account, is necessarily to also say that it is inadequate to take into account any other mitigating factor which is not wholly coterminous and synonymous with future dangerousness. Yet, as previously indicated, that would be contrary to the core holding of *Jurek*, and would in effect render *Jurek* and the Texas statute it upheld a dead letter. We do not read *Penry* as going that far.

28. Counsel in essence argued that Graham's youth explained his May 13 to 20 crime spree and that he would grow out of it: "A young man, hasn't even reached 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget.... Gary Graham, 17 years old, went on a rage for 7 days," and:

> "... what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above.... because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live...."

The only dissatisfaction counsel expressed with the charge or special issues was by pretrial motion asserting that the special issues left too much standardless discretion to the jury. See note 11, *supra*.

Nothing in the evidence indicates any basis for believing that the offense charged was any more (or less) a product of Graham's youth than any of his other criminal conduct shown by the evidence, and neither side ever suggested otherwise either at trial or in this court.

We reject Graham's contention in this court that his case is like *Penry* because here the prosecutor's argument (especially in respect to "direction" and "seeds of our past") amounted to an implied assertion that Graham's *youth* itself favored an affirmative answer to the second special issue. We disagree. The clearly most reasonable understanding of this unobjected to argument is that it is no more than the mere assertion that Graham's criminal conduct was the most reliable predictor of the direction his future would take. There is absolutely nothing in the argument which implies that this is any *more* likely so because the events of May 13–20, 1981 occurred while Graham was seventeen as opposed to, say, thirty-five (nor even that this was *as* likely so as it would have been if Graham had been thirty-five in May 1981). The prosecutor was not required to concede that just because of Graham's youth he would not in the future be a danger to society. And, there is nothing inconsistent in the assertions that, on the one hand, some youthful criminals may pose a danger to society even after they mature, and, on the other hand, that criminal acts by youths are *less* likely to be predictive of future such behavior on their part as a mature adult than are similar acts by those who are already mature adults. Moreover, we are aware of nothing to suggest that Texas has ever treated youth in this connection as anything other than a factor tending to favor (albeit not necessarily to require) a "no" answer to the second special issue.

tion is not a waiver it may reflect posture and understanding of trial participants).

We reject Graham's contention that, in light of *Penry*, the mitigating force of his youth could not adequately be given effect in answering the special issues.

Other circumstances

[14] Although the mitigating factor primarily at issue is youth, Graham also contends that under *Penry* the testimony of his stepfather, Samby, and his grandmother, Chron, constituted mitigating evidence which could not adequately be given effect in answering the special issues. We disagree.

With one exception to be noted, the testimony of Samby and Chron simply constituted rather mild evidence of normal, good—though not exceptionally good—character on Graham's part: he had respect for and was nice to his mother and stepfather, cared about and was close to his mother, gave his grandmother no problems or trouble, was never violent, never had weapons, would willingly help out around the house, went to school and to church, "loved the Lord," worked and contributed to the support of his two children.

It appears to us that the principal mitigating thrust of all this evidence is to suggest that the events of May 13–20 were aberrational and atypical of Graham's true character and that he thus had potential for rehabilitation, and would not be a continuing threat to society. As such, the mitigating force of this evidence can adequately be given effect under the second special issue.

This evidence does not seem different in kind from that before the Supreme Court in *Jurek*, where the defendant's father testified that "the petitioner had always been steadily employed since he had left school and that he contributed to his family's support." *Id.* at 2954. Nor does this sort of character evidence seem other than wholly typical of what might be expected in a vast number of cases. As noted, were evidence of this kind held to invoke *Penry*, then *Jurek* and the Texas statutory scheme would for all practical purposes be wholly eviscerated.[29] Further, this sort of evidence is different in kind from that involved in *Penry*, as its relevance to each of the special issues, and particularly the second, is entirely in the direction of a negative answer, and it has no tendency to reduce culpability for the particular crime charged in any way not encompassed within one or more of the special issues. Unlike *Penry* type disability evidence, which can reduce culpability where it is inferred that the crime is attributable to the disability while other similar offenders have no such "excuse," good character evidence provides no variety of "excuse." Further, absent some unusual indication of an essentially *permanent* adverse *change* in character (e.g., brain damage), to the extent that the testimony is convincing that the defendant's general character is indeed good it will also, to essentially the same extent, be convincing that he will not continue to be a threat to society.

29. We observe that since *Penry*, the Texas courts have held that this kind of evidence is not *Penry* evidence and does not mandate departure from the *Jurek* format. *See, e.g., Ex parte Baldree*, 810 S.W.2d 213, 216–17 (Tex.Crim.App.1991) (evidence that defendant "has been caring, kind, and nonviolent to others . . . is . . . reflective of his character and bears upon his propensity, or lack thereof, for committing future violent acts" and thus is adequately covered by the second special issue without further jury instructions); *Richardson v. State*, 1991 WL 99949, — S.W.2d — (Tex.Crim.App. June 12, 1991, No. 68934) ("evidence of appellant's religious devotion is *Franklin* evidence and could be properly addressed by a jury answering issue number two"); *Mooney v. State*, 817 S.W.2d 693 (Tex.Crim.App.1991) (same). *See also Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). In *Boyd v. State*, 811 S.W.2d 105, 111–112 (Tex. Crim.App.1991), the court considered evidence that appellant "was a good worker and was promoted," "was always polite, nice and helpful," "always behaved in a respectful manner," and helped his sister "with her asthma" and his mother "when she hurt her ankle." *Id.* at 111. In rejecting a *Penry* claim, the court said that this evidence "was given full effect within the second special issue" and "[t]o hold otherwise would be tantamount to declaring the capital sentencing scheme facially unconstitutional." *Id.* at 112 (footnote omitted).

[15] There remains only to consider the brief portion of the testimony of Chron that Graham's mother was frequently hospitalized, commencing when he was approximately three, with what Chron characterized without elaboration as a "nervous condition" or "mental illness." In an appropriate context, evidence of this general kind might well form part of a proper *Penry* presentation. We conclude that it does not do so in this case, however. There was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject. Further, the entire context in which this testimony was presented, from the point of view both of Chron's testimony as a whole and of all the defense evidence at the sentencing hearing, suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like, or that he had any mental or psychological problems. The entire thrust of the defense evidence, both from Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems," as Justice O'Connor used those terms in *Penry*. *Id.* at 2947. *See also Boyde*, 110 S.Ct. at 1199. In this respect, the evidence as a whole is simply not comparable to that in *Penry* or *Eddings*.

[16] In sum, not only Graham's youth but also his other mitigating evidence could adequately be taken into account in answering the special issues, particularly the second.[30]

Conclusion

As directed by the Supreme Court, we have further considered our previous affirmance of the district court's denial of habeas relief in light of *Penry*. We conclude that our prior disposition is consistent with *Penry*, and remain convinced that it was proper. Accordingly, we reinstate our

30. We have focused throughout on the second special issue because it is with respect to it that Graham's evidence had the most apparent and strongest mitigating relevance, and because that is the issue addressed in *Jurek*. We do not imply, however, that Graham's evidence lacked mitigating relevance to the first (or even to the third) special issue; it does have such relevance, and that relevance strengthens our conclusion that the special issues were adequate in this case; but whether such relevance to issues other than the second would alone suffice to take this case out of *Penry*'s scope is another matter.

prior mandate affirming the district court's dismissal of Graham's habeas petition.

AFFIRMED.

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS, and WIENER, Circuit Judges, join, dissenting:

The Supreme Court directed this court to reconsider Graham's petition in the light of *Penry*, not to modify *Penry* or to shape *Penry* for a comfortable fit with *Jurek*. In *Penry* Justice O'Connor wrote for the Court that the jury must be able to fully consider and give effect to all "evidence that mitigates against the death penalty" and is relevant to a defendant's background, character, or the circumstances of the crime. 109 S.Ct. at 2947, 2951. If youth is an important mitigating factor—and the Court has said that it is [1]—then *Penry* requires that the sentencing jury be allowed to decide that the death penalty is an inappropriate penalty for Gary Graham. That decision could not have been given effect in his case, and the writ should be granted.

The panel majority stated the *Penry* rule as follows: "a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence." 896 F.2d at 896. The en banc majority, after 21 months, produces an exclusion to the *Penry* rule and holds that no instruction or jury decision is needed for transitory circumstances of mitigation. This court says that any circumstance relevant to whether the defendant is rehabilitable may be adequately treated by the answer to the second issue. Contrary to what the Supreme Court wrote, the Fifth Circuit explains *Penry* as an atypical case where the mitigating evidence either had no substantial relevance, or no adverse relevance, to the second special issue of future dangerousness. I believe my colleagues have gone beyond and contrary to the directions of the Supreme Court and have usurped the role of our superiors.

Graham was 17 years old, legally a minor, when he committed the crime. It is beyond dispute that this fact was a mitigating circumstance, material to the "moral culpability" of the defendant. The jury's sentencing role is to consider such factors and determine whether the defendant is indeed personally and morally culpable. But "culpability" at the punishment phase is not simply a question of guilt or "blameworthiness," but rather a question of "deathworthiness." *See Lackey v. State*, — S.W.2d —, — (Tex.Crim.App.1991) (en banc). To say that evidence mitigates a defendant's culpability is not to say that he is any less guilty or deserving of blame, but that he is less deserving of death. *See Penry*, 109 S.Ct. at 2950 (a juror could believe that "Penry lacked the moral culpability to be sentenced to death").

The special issues of the Texas statute demonstrate how evidence can be relevant to a defendant's culpability. The guilty defendant may be less deserving of death because the evidence shows that he did not act deliberately, or that he does not pose a continuing threat to society, or that his conduct was not unreasonable in response to provocation by the deceased. Indeed, much evidence is mitigating only because it is relevant to one or more of these issues. *See Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring) (evidence of the defendant's good conduct in prison had no relevance to his character outside of the special issues). But the message of *Penry* is that some evidence may make the defendant less deserving of death for reasons "beyond the scope of the special issues." *Penry*, 109 S.Ct. at 2948. The evidence of Penry's mental retardation and history of abuse may not have made his crime less deliberate or his continuing threat to society less probable, but it may nevertheless have made him less deserving of death because it may have made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Id.* at 2949. Presented with the special verdict questions, and "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 2950.

This case presents the same dilemma. The jury found that Graham's youth did not make his crime less deliberate or his future threat to society less probable. But a reasonable juror could also have determined, if given the opportunity, that Graham did not deserve a death sentence because, at the age of 17, he was less able to control his impulses or evaluate the consequences of his conduct, or because of other relevant reasons. The majority seems to overlook the fact that "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." *Id.* at 2951. In this case, as in *Penry*, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [Graham's youth] by declining to impose the death penalty, ... the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 2952. Under *Penry*, the jury should have been allowed to weigh that factor in deciding whether Graham deserved to be sentenced to death.

The majority of this en banc court insist upon crafting their own exclusion and following *Penry* only where there is a "major mitigating thrust of the evidence ... substantially beyond the scope of all the special issues." They even declare that youth is mitigating only with respect to conduct attributable to age, and that the mitigating factor of youth at the time of the offense may be adequately taken into account by a Texas jury in answering the issue of future dangerousness. But the Supreme Court requires the sentencer, before assessing the death penalty, to consider all mitigating evidence, not only mitigating factors that contributed to particular criminal conduct. And the Court does not weigh the "thrust" of the mitigating evidence as between special issues and the decision to sentence to death.

Youth, like mental retardation or crippling circumstances in the defendant's background, may be related to deliberateness or to future dangerousness, but those facts of a defendant's life may also affect an entirely different "thrust" and decision. They may reach the much broader ultimate question: Is death the appropriate re-

1. See panel opinion 896 F.2d at 897–98. In *Eddings v. Oklahoma* the Supreme Court said: "All this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must background and emotional development be duly considered in sentencing." 102 S.Ct. at 877.

sponse to this human being, considering his moral culpability as a person? Graham's jury was not told that it could consider evidence in this light or that it could give mitigating effect to it in imposing sentence.

The majority opinion is heavy with scholarship and fine legal argument. It undoubtedly alleviates problems in reviewing the cases of Texas prisoners on death row. I fully appreciate the problems. The Texas Court of Criminal Appeals is struggling with them too. *See Black v. State*, 816 S.W.2d 350 (Tex.Crim.App.1991); *Ex parte Harvey Earvin*, 816 S.W.2d 379 (Tex.Crim. App.1991); *Lackey v. State*, — S.W.2d — (Tex.Crim.App.1991). This does not justify the failure to follow the dictate of the Supreme Court. I would follow that dictate unless the Court, which alone has the authority, chooses to modify our instructions.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

The ultimate question in this case is whether the mitigating value of Graham's youth and family circumstances—age seventeen at the time of the offense—is fully expressed by the jury in its answer to two questions: did Graham act deliberately and does Graham present a future danger. The majority opinion, after first concluding that any deficiency in the two questions must be substantial, holds that the answer is yes. I am unpersuaded that the jury's assessment of Graham's moral culpability is fully, or substantially as the majority has it, exhausted by concluding that he acted deliberately and presents a future danger. A jury's reasoned response could be that although Graham acted deliberately, and is likely to do so again, when Graham's tender years and family circumstances are entered in the account of moral culpability, a death sentence is not warranted.

It was true before *Penry* that "[t]he state may not by statute preclude the sentencer from considering *any* ... relevant mitigating evidence."[1] That did not necessarily mean, however, that the state could not limit the effects of mitigation. There was a powerful argument that, given *Jurek*, the Eighth Amendment allowed the state to limit the effects a sentencer might give to mitigating evidence. Justice Scalia made the argument in *Penry*, but his was the dissenting view.

I intend no criticism of the majority's able struggle, but I am not persuaded that we have the freedom to define again the jury's sentencing role in Texas. I say "again" because two decisions of the Supreme Court control this case. The first is that the state, without fettering effect, must give the jury the means for expressing its reasoned moral response.[2] The second decides that Graham's youth and family circumstances are relevant to the core decision for the jury—his moral culpability.[3]

The state may insist upon the jury's "reasoned" moral decision, but the contribution of Graham's youth to his moral culpability, beyond the issues of deliberateness and future dangerousness, has no intrinsic measure or objective weight. There

1. *Eddings v. Oklahoma*, 455 U.S. 104, 113–115, 102 S.Ct. 869, 876–877, 71 L.Ed.2d 1 (1982).
2. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).
3. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see also Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988).

is a point at which we must accept that the moral culpability of a particular person for a particular crime is what the jury says that it is. With all deference, this quintessential blackbox decision yields to no logical or explainable divisor. It is not a "legal" question at all, but is rather like asking judges not to reason but to look to the sky, presumably, and react. Such discrete Rorschach-like inquiries do not produce normative rules. That we are asked to perform such tasks is a powerful signal that something is wrong. The wrong is not difficult to locate. As Justice Harlan put it in *McGautha*:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, *appear to be tasks which are beyond present human ability* (emphasis supplied).[4]

Furman repudiated *McGautha*, but Justice Harlan's wisdom is validated with each encounter of dead ends in the resulting conceptual puzzle. And a puzzle it is.

For example, the Supreme Court in *Cabana v. Bullock*[5] upheld the death sentence while observing that "the jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill."[6] This despite the fact that in *Enmund v. Florida*[7] the court held that the Eighth Amendment forbids the death penalty for "one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing takes place, or that lethal force will be employed."[8] I would have supposed that whether an accused intended to kill lies at the heart of moral culpability; that the finding of intent to kill would be left with the sentencer. Stated another way, if a state's procedures must allow a defendant's mitigating evidence to find expression in its verdict it is puzzling to allow a state appellate court to supply the critical finding of intent to kill, a finding missing from the jury's verdict. It is a long road from *McGautha* to *Penry*, but the resulting jurisprudence is perverse in that it insists on a reasoned moral response of the jury, an assignment we jurists have failed.

The solution must be left to the Supreme Court, at least in cases as this one where we are left no meaningful latitude. In any event, this case is already so postmarked by the predictable scattering of judges required to react, not reason.

4. *McGautha v. California*, 402 U.S. 183, 204, 91 S.Ct. 1454, 1466, 28 L.Ed.2d 711 (1971).
5. 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).
6. 474 U.S. at 384, 106 S.Ct. at 696.
7. 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).
8. 458 U.S. at 797, 102 S.Ct. at 3376.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 3 1992
GILBERT E. GANUCHEAU
CLERK

No. 88-2168

D.C. Docket No. CR-H-88-563

GARY GRAHAM,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Dept. of Criminal Justice,
Institutional Div.,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
On Remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, and BARKSDALE, Circuit Judges.*

J U D G M E N T

This cause came on to be heard on rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause is affirmed by the Court en banc.

January 3, 1992

ISSUED AS MANDATE:

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS and WIENER, Circuit Judges, join dissenting.

HIGGINBOTHAM, Circuit Judge , dissenting.

* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

APPENDIX C

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Crim. Justice, Institutional Div., Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

June 4, 1990.

Appeal from the United States District Court for the Southern District of Texas; David Hittner, District Judge Presiding.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 7, 1990, 5 Cir., 1990, 896 F.2d 893)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this case shall be reheard by the Court en banc with oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX D

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director Texas Dept. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

March 7, 1990.

Petitioner under sentence of death for capital murder conviction sought habeas relief. The United States District Court for the Southern District of Texas, David Hittner, J., denied petition, and petitioner sought certificate of probable cause, seeking stay of execution and habeas relief. The Court of Appeals, 854 F.2d 715, denied petition, and petitioner applied for certiorari. The Supreme Court, 109 S.Ct. 3237 (memorandum decision), vacated and remanded. The Court of Appeals, Reavley, Circuit Judge, held that Texas capital sentencing system did not enable jury to consider and give effect to youth as mitigating factor without special instructions.

Judgment reversed, death sentence vacated, and matter remanded.

E. Grady Jolly, Circuit Judge, filed dissenting opinion.

1. Criminal Law ⇐1208.1(5)

General contours of constitutional limits for capital punishment permit imposing sentence of death only when crime involves statutorily enumerated aggravating circumstances and after jury has been able to consider and to give effect to any mitigating circumstances. U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐796

Jury sentencing capital defendant who provides evidence about his character, his background, or circumstances of offense that is relevant to personal culpability beyond scope of statutory questions asked under Texas capital sentencing system must receive instructions that allow it to give effect to such evidence. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐824(4)

Request for additional instruction at trial was not element of claim that jury was unable to consider and give effect to youth as mitigating factor without special instructions under Texas capital sentencing system. Vernon's Ann.Texas C.C.P. art. 37.071(b-e); U.S.C.A. Const.Amend. 8.

4. Criminal Law ⇐796

Texas capital sentencing system did not enable jury to consider and give effect to youth as mitigating factor without special instructions. Vernon's Ann.Texas C.C.P. art. 37.071(b-e); U.S.C.A. Const. Amend. 8.

5. Criminal Law ⇐1213.8(8)

Habeas Corpus ⇐498

Error in failure of Texas court to instruct jury in capital sentencing proceeding so as to enable jury to consider and give effect to youth as mitigating factor was not harmless; risk that defendant would be sentenced to death in spite of factors that could call for less severe penalty was incompatible with principles of the Eighth and Fourteenth Amendments. Vernon's

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Ann.Texas C.C.P. art. 37.071(b-e); U.S.C.A. Const.Amends. 8, 14.

Appeal from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before REAVLEY, KING and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

We have been directed to revisit this case by the Supreme Court, which vacated our prior decision, reported at 854 F.2d 715, and remanded for further consideration in light of *Penry v. Lynaugh*, — U.S. —, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The narrow issue we reach on remand is whether under the Texas capital sentencing system a jury is able to consider and give effect to youth as a mitigating factor without special instructions. We conclude that a jury is unable to do so and therefore vacate Graham's capital sentence.

I.

In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion.

II.

B.

[1] Capital punishment jurisprudence has progressively refined the constitutional boundaries within which a sentencing jury may impose the death penalty. The general contours of those limits permit imposing a sentence of death only when the crime involves statutorily enumerated aggravating circumstances and after a jury has been able to consider and to give effect to any mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104, 110–12, 102 S.Ct. 869, 874–75, 71 L.Ed.2d 1 (1982); *Gregg v. Georgia*, 428 U.S. 153, 195–97, 96 S.Ct. 2909, 2935–36, 49 L.Ed.2d 859 (1976). This structure limits the imposition of the death penalty to egregious circumstances and meets the Eighth Amendment requirement of "an individualized assessment of the appropriateness of the death penalty." *Penry*, 109 S.Ct. at 2946.

In *Jurek v. Texas*, 428 U.S. 262, 276–77, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), the Supreme Court upheld the Texas capital sentencing system against broad constitutional attacks. However, in *Penry*, the Court narrowed the circumstances in which the Texas statute meets the requirements of the Eighth and Fourteenth Amendments. *See Penry*, 109 S.Ct. at 2947–52.

[2, 3] Under the Texas system, a jury sentencing a defendant found guilty of murder under aggravated circumstances must answer the following questions:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Code Crim.Proc.Ann. art. 37.071(b) (Vernon Supp.1990). If the jury unanimously answers "yes" to each question submitted, the trial court must sentence the defendant to death. *Id.* art. 37.071(c)-(e). If any question is answered in the negative, the defendant receives a life sentence. *Id.* art. 37.071(e).

The Texas statute's constitutionality has repeatedly turned on the issue of "whether the enumerated questions allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956. The statute withstood constitutional attack in *Jurek*, because "three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." *Lockett v. Ohio*, 438 U.S. 586, 607, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978) (quoting *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956 (Stevens, J., plurality)).

In *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court again considered the constitutionality of the Texas system. Franklin claimed his Eighth Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. The case produced a plurality opinion, with Justices O'Connor and Blackmun concurring in the result. Justice White, writing for the plurality, stated that "[i]t is the established Texas practice to permit jury consideration of ' "whatever mitigating circumstances" the defendant might be able to show' in capital sentencing." *Id.* 108 S.Ct. at 2326 (White, J., plurality). He also noted that the only mitigating evidence Franklin offered—his good prison record—could be considered in response to the future dangerousness question. *Id.* at 2329. Justice White further indicated that a state may "channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty," *id.* at 2331,[1] and ultimately concluded that the trial court's refusal to issue special instructions did not violate the Eighth Amendment, *see id.* at 2332.

In her concurrence, Justice O'Connor took issue with the plurality's suggestion that a state could restrict a jury's ability to consider mitigating evidence and underscored the importance of allowing the jury to give effect to mitigating evidence that is "relevant to the defendant's character or background or the circumstances of the offense." *Id.* at 2332-33 (O'Connor, J., concurring). However, Justice O'Connor concluded that the Eighth Amendment did not require special instructions in that case because the evidence of Franklin's good prison disciplinary record could be considered and given effect in answers to the question on future dangerousness. *Id.* at 2333.

The *Penry* Court, however, did find that the statute could be unconstitutionally applied in some circumstances. Like Franklin, Penry had argued that his Eighth

1. Chief Justice Rehnquist and Justices White, Scalia, and Kennedy adhered to this view in the *Penry* dissent, penned by Justice Scalia. *See Penry*, 109 S.Ct. at 2967–69.

Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. However, Penry had offered evidence of his mental retardation and abused childhood as factors mitigating against the imposition of the death penalty, rather than simply a good prison record. *Penry*, 109 S.Ct. at 2952. The distinction between *Franklin* and *Penry* rested upon the relevance of Penry's evidence to his background and its reflection on his moral culpability.

Justice O'Connor, writing for the majority, stressed that "the punishment should be directly related to the personal culpability of the defendant...." *Id.* at 2951.[2] The Eighth Amendment requires consideration of a capital defendant's background and character " 'because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Id.* at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). In examining the statutory questions that the jury must consider in returning a verdict for death, she found that the jury had insufficient latitude to express its findings regarding culpability. With respect to the first question, Justice O'Connor noted that while the jury was able to consider Penry's mental retardation and abused childhood in answering the questions regarding deliberateness, "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Id.* 109 S.Ct. at 2949. Thus, the mitigating effects of mental retardation and an abused childhood could not be given full effect in response to this question.

With regard to future dangerousness, the evidence of Penry's mental retardation and abused childhood was viewed as a "two-edged sword." *Id.* One effect of mental retardation is the inability to learn from one's mistakes. Although retardation may diminish blameworthiness, it also makes it more likely that a retarded defendant will be dangerous in the future. A juror could have found both that Penry posed a future danger and that he was less culpable than a person with average intelligence. However, the question provides no vehicle for expressing the finding of reduced culpability. *Id.* The Court also found that the third question provided an inadequate alternative for addressing reduced culpability. *Id.* at 2950. Accordingly, because the evidence was relevant beyond the scope of the special issues, the Court concluded that the statutory questions did not adequately provide the jurors with an opportunity to give a "reasoned moral response" to that evidence. *Id.* at 2952.

We understand the Court's rule after *Penry* to be this: a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence. However, in the *Franklin-Penry* aftermath, we are left with the task of determining which type of evidence mandates special instruction.[3] At the out-

2. The majority with regard to this issue was comprised of Justices O'Connor and Blackmun and the three *Franklin* dissenters, Justices Stevens, Brennan, and Marshall.

3. The Supreme Court has assumed that additional instructions could answer the problem, perhaps by broadly defining "deliberately" in the first jury question. See *Penry*, 109 S.Ct. 2949 and *Jurek*, 96 S.Ct. at 2956 n. 7. We have great difficulty with that assumption and believe it to be necessary to submit another question in order that the jury might give effect to all mitigating factors. See *State v. Wagner*, 309 Or. 5, 28–29, 786 P.2d 93, 106–07 (1990) (en banc) (indicating that Oregon courts are constitutionally required to add a fourth question under a statutory scheme similar to that of Texas). If the jury decides that the defendant, after careful consideration, fully intended to take the life of his victim, how can "deliberately" be "defined" to require a negative answer to the inquiry where the jury also decides that an abused and retarded adolescent should not be put to death for his wrong—even though it was certainly committed "deliberately"? The requested issues in *Franklin* are set forth at 108 S.Ct. 2324 n. 4. The jury would certainly be confused by instructions that seem to be allowing a "no" answer even when the question itself calls for a "yes" answer. And if the instruction should be given, modifying the plain meaning of the question, and if the jury answers "yes," how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question that was asked?

set we note that no procedural bar objection has been raised and that the case has been presented for a decision on the merits. Additionally, although Graham's counsel did not request an additional instruction at trial, such a request is not an element of a *Penry* claim. *Mayo v. Lynaugh*, 893 F.2d 683, 688–90 (5th Cir.1990) (suggestion for rehearing en banc pending).

[4] The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree.

Graham was seventeen years old at the time that the murder was committed. His stepfather, Joe Samby, and his grandmother, Erma Chron, testified on his behalf. Samby testified that Graham, who lived and worked with his father, would visit his mother once or twice a week and would help with chores around the house. He also testified that Graham loved his mother, who was currently on medication and was a "nervous type."

Chron testified that Graham began staying with her intermittently, beginning at the age of three, because his mother was hospitalized "at least twenty" times for a nervous condition that Chron classified as mental illness. Graham then went to live with his father at the age of eleven or twelve. Chron further testified that while Graham was living with her, he went to church and school, was never violent, never possessed weapons, and never gave her any problems.

Age has long been considered "one of the individualized mitigating factors that sentencers must be permitted to consider...." *Stanford v. Kentucky*, — U.S. —, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see Eddings*, 455 U.S. at 115–16, 102 S.Ct. at 877; *Jurek*, 428 U.S. at 272–73, 96 S.Ct. at 2956–57; *Gregg*, 428 U.S. at 197, 96 S.Ct. at 2936. A jury also must be able to give effect to "evidence of a turbulent family history" in the capital sentencing of a minor. *Eddings*, 455 U.S. at 115–17, 102 S.Ct. at 877–78.

Moreover, age reflects on moral culpability. In *Thompson v. Oklahoma*, the Court restated "the proposition that less culpability should attach to a crime committed by a

juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988) (Stevens, J., plurality); *see id.* at 2708 (O'Connor, J., concurring in the judgment) ("Granting the plurality's other premise—that adolescents are generally less blameworthy than adults who commit similar crimes...."). This conclusion is premised on the notion that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 2699 (Stevens, J., plurality). In sum, "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*

The state argues, however, that Graham was not entitled to a special instruction because the evidence of youth and a difficult home life is not relevant beyond the scope of the statutory questions. The state points out that the relevant problems of adolescents—limited abilities to control impulsive behavior, to evaluate the future consequences of their actions, and to appreciate the possibility and finality of death—can be considered in answering the deliberateness question. That, however, does not end the matter, because a jury that found Graham had acted deliberately might also find him less culpable than an adult. If so, the jury would be compelled to answer the issue affirmatively, and it would be unable to give full effect to Graham's mitigating evidence. *See Penry*, 109 S.Ct. at 2949.

4. The third question was not presented to the jury.

The state further argues that all of the mitigating qualities associated with adolescence are squarely addressed by the future dangerousness question. The state notes that any limitations attributable to adolescence are necessarily transitory. It then argues that a juror finding Graham's moral culpability reduced as a result of his youth could have given effect to the evidence by finding that he did not present a danger in the future. This argument, however, ignores the possibility that a juror could find Graham likely to be dangerous in the future but could also conclude that he was less culpable as an adolescent. If so, that juror could not give effect to the finding of reduced culpability in answering the question.[4] The point of *Penry* is not that a special instruction is unnecessary if a jury could give *some* effect to relevant evidence through the statutory questions; rather, a special instruction is required if a jury cannot give *full* effect to that evidence.

The dissent argues that the mitigating value of youth, without more, is fully covered by the two issues of the Texas verdict. Accordingly, he believes that a special instruction was unnecessary because Graham did not argue that his youth was relevant to any issue other than his future dangerousness and because he did not suggest that his crime was in any way attributable to his youth or to any characteristic associated with his youth.

This view is too restrictive. Adolescence alone is a possible mitigating factor against a sentence of death. The jury was entitled to draw on its common experience and consider the mitigating effect of Graham's youth. A juror who concluded that Graham deliberately committed murder and

posed a future danger but who also concluded that a punishment of death was less justified for him because of his age was not able to give effect to that judgment. Without special instruction under these circumstances, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 2952.[5]

[5] The state further contends that even if an instruction was erroneously omitted, that error was harmless. We cannot accept that argument. The risk that a defendant will be sentenced to death in spite of factors that "may call for a less severe penalty" is incompatible with principles of the Eighth and the Fourteenth Amendments. *Lockett*, 438 U.S. at 605, 98 S.Ct. at 2965.

The district court's judgment is reversed, and the death sentence is vacated. The cause is remanded to the district court for further orders.

E. GRADY JOLLY, Circuit Judge, dissenting:

I respectfully dissent from the majority's effectively setting aside the death penalty in this case on grounds of what amounts to the failure of the trial judge, sua sponte, specifically to instruct the jury that it was free to grant mercy solely because of the defendant's youth at the time of the offense.

With respect to Gary Graham's youth as a sentencing factor, the jury was presented with nothing more than the fact that he was seventeen years old at the time he committed the offense. That isolated fact, without further development, does not furnish a base upon which a reasonable juror could rationally conclude that Graham bears less moral culpability than other citizens. *See Kelly v. Lynaugh*, 862 F.2d 1126, 1133 n. 12 (5th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 3263, 106 L.Ed.2d 608 (1989).

I do not dispute that age at the time of the offense can be a relevant mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). The reason that youth can be a relevant mitigating factor is the "recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults." *Eddings*, 102 S.Ct. at 877 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979)). Youth can mitigate against imposition of the death penalty because a juror could conclude that a defendant who commits a criminal act *attributable to that defendant's youth* is less culpable than a defendant who has no such excuse, and that such a defendant should not receive the ultimate penalty. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).

As presented in this case, Graham's youth presented no mitigating factor beyond the scope of the special issues. Graham's youth is obviously relevant to the

5. The dissent understands our ruling to mean that "the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth." However, it is precisely because Graham's youth reflects upon his moral culpability that we believe the Eighth Amendment mandates a jury instruction.

first and second special issues of the Texas statute. In his argument to this court, Graham does not indicate how such evidence had relevance beyond the scope of the special issues. Moreover, during the sentencing phase of his trial, he introduced no evidence that would support such additional relevance. Specifically, Graham's counsel only urged the sentencing jury to consider his youth in deciding the answer to special issue no. 2, whether Graham was likely to pose a continuing threat to society. *See Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir.1989) (Texas statute constitutionally applied when mitigating evidence specifically proffered in context of special issues).

Nor did Graham introduce any evidence to suggest that the murder he committed was in any way attributable to his youth. Furthermore, in his closing argument during the sentencing phase of the trial, Graham's counsel did not even argue that Graham's crimes were attributable to his youth:

> Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face[s]. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe.

In my view, no special instruction is necessary unless there is at least some evidence or argument from which a juror could reasonably conclude that a defendant who commits a criminal act attributable to that defendant's youth is less culpable than a defendant who has no such excuse. *See Penry*, 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)).

Nevertheless, if a juror, even in the absence of any evidence or argument suggesting as much, were convinced that Graham's moral culpability was somehow reduced because his crime was in some unspecified way attributable to his youth, that juror would surely reason that because youth is by nature a transitory condition, Graham would cease to act violently when he outgrew his adolescence. Such a juror would have been able to give full mitigating effect to the fact of Graham's youth by giving a negative answer to the future dangerousness inquiry of the second special issue.

Furthermore, Graham presented no evidence regarding psychological characteristics of his adolescence and their effects on his perceptions and behavior, and points to no such effects in his arguments to this court. Unlike Penry, Graham has made no attempt to relate these factors to his own situation. Here, if a juror believed, even in the absence of any evidence to support such a belief, that Graham, because of his youth, had a limited ability to control impulsive behavior, evaluate the future consequences of his conduct, and appreciate the possibility and finality of death, that juror was free to give a negative answer to the first special issue as well, whether the defendant acted deliberately and with the reasonable expectation that death would result.

Therefore, in my view, the jury was able, without the need for any special instructions, to take into account all of the characteristics associated with Graham's youth, and give that mitigating evidence full effect, in answering the first and second special issues under the Texas statute.

The question is whether the jury instructions provide the jury with a vehicle for expressing a "*reasoned* moral response" to the mitigating evidence introduced by the defendant. *Penry*, 109 S.Ct. at 2952 (emphasis added). The majority fails to identify in the case before us and on the evidence before us how the jury was unable to make a *reasoned* moral response to the isolated and undeveloped fact of Graham's youth. The majority acknowledges that youth is relevant to the first and second special issues, but believes that the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth. In my view, such a response by the jury in this case, where there is no evidence or argument that Graham's crime was attributable to his youth or that any characteristics of his youth have relevance to his personal or moral culpability beyond the scope of the statutory issues, would not be a *reasoned* moral response, but an *unreasoned* response. I cannot agree with the majority that the defendant has a constitutional right to such unbridled jury discretion. The evidence before the jury simply offered no basis upon which a *reasoned* moral judgment would excuse the death penalty in this case.

Finally, the majority's formulation of the *Penry* rule omits any reference to the Supreme Court's statement that the jury must, *upon request*, be given instructions that allow the jury to give effect to evidence about the defendant's character, background, or the circumstances of the crime that is relevant to the defendant's moral culpability beyond the scope of the special issues. *Penry*, 109 S.Ct. at 2945. Graham's counsel did not object to the jury instructions that were given, nor did he request any additional instructions or a fourth special issue. In my view, a request for instructions is an integral part of a *Penry* claim. *Cf. Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir.1989) (suggestion for rehearing en banc pending) "Mayo's counsel satisfied the prerequisites of the claim by offering mitigating evidence at the sentencing phase.").

For the foregoing reasons, I believe that Graham's sentencing jury was fully able to give a "reasoned moral response" to the fact of Graham's youth when it answered the special issues of the Texas statute. Because I believe that the Texas statute was constitutionally applied to Graham, I respectfully dissent.

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APPENDIX E

Gary GRAHAM, Petitioner-Appellant,

v.

James LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

Aug. 31, 1988.

Petition was filed for certificate of probable cause seeking stay of execution and habeas relief. The United States District Court for the Southern District of Texas, David Hittner, J., denied relief. Petitioner appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) death sentence did not violate Eighth Amendment; (2) Texas death penalty statute is constitutional; and (3) evidence supported finding that petitioner was competent to be executed.

Petition for certificate of probable cause denied.

1. Habeas Corpus ⇐113(6)

Standard for granting certificate of probable cause requires habeas petitioner to make substantial showing of denial of federal right.

2. Criminal Law ⇐1213.8(8)

Imposition of death sentence on 17-year-old convicted of capital murder in Texas state court did not violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐1213.2(2)

Texas statutory death sentencing procedure, which determines punishment by allowing jury only to answer specific questions, allows jury to consider mitigating circumstances, and thus, does not violate Eighth Amendment. Vernon's Ann.Texas C.C.P. arts. 37.01, 37.071(b); U.S.C.A. Const.Amend. 8.

4. Criminal Law ⇐641.13(7)

Trial attorney in state capital murder trial was not ineffective, although defendant contended attorney construed death penalty statute as precluding consideration of mitigating factors; attorney was not in any way discouraged by statute from presenting mitigating evidence of defendant's psychiatric treatment, but, rather, his decision not to pursue that course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced. Vernon's Ann.Texas C.C.P. art. 37.01; U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐981(1)

Competent evidence supported state court's finding that defendant was competent to be executed.

6. Habeas Corpus ⇐90.3(5)

Habeas petitioner failed to overcome presumption that state trial court's findings that defense counsel was effective were correct. U.S.C.A. Const.Amend. 6.

7. Constitutional Law ⇐270(2)
Criminal Law ⇐1206.1(2), 1213.2(2)

Texas death penalty statute provides proportionality and does not violate Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. U.S.C.A. Const.Amends.

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4-6, 8, 14; Vernon's Ann.Texas C.C.P. art. 37.01.

8. Constitutional Law ⇐221(1, 5), 250.-2(1, 4), 265, 267
Grand Jury ⇐2½
Jury ⇐33(2.1)

Exclusion of 18 year olds and blacks from grand and petit juries in state capital murder trial did not violate defendant's due process and equal protection rights; peremptory challenges against blacks resulted from veniremen's testimony that they were opposed to death penalty and no case law suggested that exclusion of 18 year olds was unconstitutional. U.S.C.A. Const. Amends. 5, 14.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, KING and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Gary Graham, seven years after his conviction in the Texas state courts for capital murder, is before us for the first time and petitions this court for a certificate of probable cause, seeking a stay of his execution and habeas relief under 28 U.S.C. § 2254. We granted a temporary stay of his execution, received briefs, and heard argument so that we could consider his petition more closely. After a thorough review, we are convinced that Graham's contentions are meritless and that he has failed to make any showing of the denial of a federal right. We therefore deny Graham's petition for certificate of probable cause. Nevertheless, in order that the Supreme Court may have an opportunity to consider this case, the temporary stay will not be lifted until 12:01 a.m., September 30, 1988.[1]

I

This habeas corpus petition arises from Graham's conviction in 1981 in Texas state court for the felony offense of capital murder. Graham, who was seventeen at the time of the crime, was represented by two attorneys who developed a defense around mistaken identity. Counsel advised Graham against testifying, and he followed this advice. No alibi witnesses were called, and only two mitigation witnesses testified during the sentencing phase. Graham was found guilty and sentenced to death.

Graham appealed his conviction to the Texas Court of Criminal Appeals. He argued that the trial court improperly excluded five prospective jurors and denied a limiting instruction regarding extraneous offenses. On June 12, 1984, in an unpublished per curiam opinion, the court of criminal appeals affirmed the conviction. It was not until June 26, 1987, however, that the trial court set the execution date. Execution was set for July 30, 1987.

Graham then began these efforts for postconviction relief when he petitioned the Texas state district court. Because the petition was not filed until July 13, 1987, less than three weeks before the scheduled date, execution was postponed to allow time for judicial review. After the district court conducted an evidentiary hearing on January 8, 1988, the court entered findings of fact and conclusions of law recommending denial of relief. The Texas Court of Criminal Appeals then denied relief on February 19, 1988. Graham's execution was then rescheduled for February 25.

1. Cases are pending that may have related issues. *See* notes 2 and 8 *infra*.

Graham filed this petition for a writ of habeas corpus and stay of execution in federal district court on February 23, 1988. The district court found that all relevant facts had been developed by the state court and adopted the state court's factual findings. *See Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). After reviewing Graham's legal contentions, the district court, on the eve of Graham's scheduled execution, determined that his claims were meritless, denied relief and denied a certificate of probable cause.

Graham immediately appealed and asked this court to grant his petition for a certificate of probable cause. We issued an order temporarily staying Graham's execution so that we might have more time to examine his request. *See, e.g., Henry v. Wainwright*, 743 F.2d 761, 762 (11th Cir. 1984). After submission of briefs and oral argument, we now address the questions before us.

II

[1] The standard for granting a certificate of probable cause "requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983) (quoting *Stewart v. Beto*, 454 F.2d 268, 270, n. 2 (5th Cir.1971), *cert. denied*, 406 U.S. 925, 92 S.Ct. 1796, 32 L.Ed.2d 126 (1972)). In the light of this test, we turn to the issues before us.

A.

[2] First, Graham asserts that his death sentence violates the eighth amendment because he was seventeen at the time of the offense. Graham contends that, despite Texas state court and Fifth Circuit precedent to the contrary, this issue is meritorious because recently the Supreme Court has called into serious question the application of the death penalty to teenagers. *Thompson v. Oklahoma*, — U.S. —, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion). Upon reviewing the *Thompson* decision, we find that it offers Graham no help. In a plurality opinion, Justice Stevens concluded that the eighth amendment prohibits the execution of an individual who is under sixteen years of age at the time the crime was committed. *Id.* at —, 108 S.Ct. at 2700. Justice Stevens based the decision upon what he considered to be the current "evolving standards of decency." *Id.* at —, 108 S.Ct. at 2691. The opinion examined the capital punishment policies of all the states and found a consensus that imposition of capital punishment upon someone who is under sixteen years of age is "now generally abhorrent to the conscience of the community." *Id.* at —, 108 S.Ct. at 2697.

Justice O'Connor, although concurring in the judgment, declined to find expressly that a national consensus existed that prohibited the execution of anyone under the age of sixteen. *Id.* at —, 108 S.Ct. at 2704-05. Hence she concluded only that "petitioner and others who were below the age of sixteen at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Id.* at —, 108 S.Ct. at 2711.

Neither Justice Stevens' nor Justice O'Connor's opinion bears any suggestion that an individual of Graham's age cannot

be sentenced to death. The evidence relied on in *Thompson* simply reflected a likely consensus among the states that execution of an individual *under the age of sixteen* was cruel and unusual punishment. Neither the holding nor the rationale of *Thompson* supports an argument that the eighth amendment bars the death penalty against persons who are sixteen or older. *See* — U.S. at ——-——, 108 S.Ct. at 2691-96. Thus, *Thompson* does not aid Graham.

Graham fairs no better under Fifth Circuit precedent. This court has specifically observed that "[n]o court has ruled that in all cases and under all circumstances, the execution of those who commit capital offenses while under the age of eighteen constitutes cruel and unusual punishment." *Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir.1984). Texas state law has similarly held that the capital sentencing of an individual who is less than eighteen years old is not unconstitutional. *Cannon v. State*, 691 S.W.2d 664, 678 (Tex.Crim.App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Ferguson v. State*, 573 S.W.2d 516, 525 (Tex.Crim.App. 1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304 (1979). There are no special circumstances in Graham's case that indicate that he should be treated any differently from any other seventeen-year-old person who commits the crime of capital murder. We therefore must conclude that Graham's first contention has no constitutional basis.[2]

B.

[3] Graham challenges the Texas death penalty statute, Tex. Code Crim.Proc.Ann. art. 37.01 (Vernon 1981 & Supp.1987), under the fifth, sixth, eighth and fourteenth amendments of the United States Constitution and corresponding Texas provisions. He objects to the statutory sentencing procedure that determines punishment by allowing the jury only to answer specific questions.[3] Tex.Crim.Pro.Code Ann. art. 37.071(b) (Vernon 1981 & Supp.1987). Under the Texas scheme, only two special issues were submitted to the jury: (1) whether the crime was committed deliberately, and (2) whether the defendant is likely to pose a future danger to society. Graham alleges that these questions do not permit the jury to weigh mitigating circumstances when formulating their answers.[4]

Graham's attack upon the Texas statutory sentencing scheme raises issues that are similar to those contained in *Franklin*

2. We are cognizant of the Supreme Court's grant of certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir.1987), *cert. granted*, — U.S. ——, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). *High* deals specifically with the imposition of the death penalty on a seventeen-year-old defendant. This panel, however, is bound by Fifth Circuit precedent which holds that the execution of a defendant who was aged seventeen when the crime was committed does not constitute cruel and unusual punishment. *See Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir.1984).

3. He further contends that the statute does not define "mitigating circumstances" and that the trial court failed to instruct the jury on the proper treatment of mitigating circumstances. These contentions are meritless in the light of Supreme Court and Fifth Circuit decisions upholding the constitutionality of the Texas sentencing scheme. *See e.g. Franklin v. Lynaugh*, — U.S. ——, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir.1986).

4. These mitigating factors introduced at the sentencing phase, included Graham's youth and his difficult childhood.

v. Lynaugh, which, at the time we granted a temporary stay, was pending before the Supreme Court, 823 F.2d 98 (5th Cir.), *cert. granted*, — U.S. ——, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987). The Court granted certiorari on the issue of "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." The *Franklin* petitioner had requested five jury instructions that would have informed the jury that they should consider all mitigating evidence in answering the Texas statutory questions. — U.S. ——, ——, ——, 108 S.Ct. 2320, 2324, 2325, 101 L.Ed.2d 155 (1988). The requested instructions further stated that the jury could answer the statutory questions in the negative if they found any evidence mitigating against the death penalty. — U.S. at ——, ——, 108 S.Ct. at 2324, 2325. The trial court refused these special jury instructions and Franklin asserted that because the Texas sentencing scheme did not allow the jury to consider the full range of the mitigating evidence, his eighth amendment rights were violated. *Id.*[5]

On June 22, 1988, the court issued its plurality opinion upholding the Texas statute. *Franklin v. Lynaugh*, — U.S. ——, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion). Writing for the plurality, Justice White concluded that the trial court did not violate the eighth amendment by refusing to grant Franklin's requested instructions. — U.S. at ——, 108 S.Ct. at 2331-32. He based this holding on the conclusion that the Texas statutory questions did not prevent the *Franklin* jury from considering mitigating evidence. He stated: "It is the established Texas practice to permit jury consideration of ' "whatever mitigating circumstances" the defendant might be able to show' in capital sentencing...." *Id.* at ——, 108 S.Ct. at 2326. He further noted that Franklin was allowed to present, and the jury allowed to consider, the only mitigating evidence offered, i.e., his good prison disciplinary record. *Id.* at ——, 108 S.Ct. at 2328. Indeed, this particular mitigating circumstance could be considered specifically in response to the Special Issues before the jury because it related to the statutory question of future dangerousness. *Id.* In short, the plurality opinion expressly reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and thus appears to uphold the Texas statute against any argument that it limits consideration of relevant mitigating evidence.[6] *Id.* — U.S. at ——, 108 S.Ct. at 2331.

Justice O'Connor, although concurring in the judgment of the court, wrote separately, joined by Justice Blackmun. Justice O'Connor's opinion took exception to Justice White's suggestion that a state may limit the sentencing authority's ability to consider mitigating evidence. *Id.* at ——, 108 S.Ct. at 2332. She noted that the Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion), held that the state could not prevent the jury "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." She emphasized her view that a

5. The issue of whether the jury can consider "residual doubt" as a mitigating factor was also before the Court in *Franklin*. — U.S. ——, 108 S.Ct. 2320. Graham, however, does not raise this issue and we do not address it.

6. We do note, however, that the conlusion of the opinion might be interpreted to limit its holding to the facts in Franklin's case. *See Franklin*, — U.S. at ——, 108 S.Ct. at 2325.

jury's sentencing decision "should reflect a reasoned *moral* response to the defendant's background, character, and crime," *id.* — U.S. at —, 108 S.Ct. at 2333 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, Jr., concurring) (emphasis in original)), and concluded that a state cannot prevent the jury from considering the full scope of relevant evidence that might mitigate the defendant's culpability for the crime. Justice O'Connor reconciled her broader view with the judgment in *Franklin* by noting that the only mitigating evidence introduced by Franklin was that he had a good prison disciplinary record. Since the jury could consider this mitigating evidence in answering the Special Interrogatory concerning future dangerousness, Justice O'Connor upheld the Texas sentencing scheme as it applied to Franklin. *Id.*

In relating *Franklin* to the instant case, we first note that the plurality opinion, and thus the judgment of the Court, clearly upheld the Texas sentencing scheme. Second, we observe, however, that the evidence relative to mitigation in this case is more similar to *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), than to *Franklin*. There were two mitigating points made to the jury here: (1) Graham was seventeen-years old at the time the crime was committed and (2) he had a difficult family life. Thus, the concerns about the Texas sentencing scheme expressed by Justice O'Connor, that the jury may be prevented from considering the full range of the mitigating evidence as it relates to the defendant's moral culpability, could be directly at issue in this case.

We hold, nevertheless, that the jury's verdict in *Graham* is consistent with the constitutional requirements outlined in *Franklin* and other precedents. Indeed, we are convinced that the plurality opinion in *Franklin* only strengthens past circuit and Supreme Court decisions that indicate that Graham cannot prevail upon his eighth amendment challenge. For instance, *Franklin* reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), which expressly held the Texas death penalty statute constitutional. *Franklin*, — U.S. at —, —, 108 S.Ct. at 2325, 2328. The plurality opinion cited with approval *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which noted that the Texas statute does allow the jury fully to consider relevant mitigating circumstances.[7] Following these guidelines, this circuit, upon numerous occasions, has concluded that the Texas statute does allow consideration of mitigating evidence, and that the statute is constitutional. *Selvage v. Lynaugh*, 842 F.2d 89, 94 (5th Cir.1988); *Williams v. Lynaugh*, 837 F.2d 1294 (5th Cir.1988), *cert. granted*, — U.S. —, 108 S.Ct. 1000, 98 L.Ed.2d 967 (1988); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir.1986).[8] We conclude, therefore, that Graham's arguments on these grounds are meritless.[9]

7. Graham also contends that the jury should be informed of the effect of their answers to the sentencing questions. The state court found that the jury *did* advise the jurors of the consequences of their answers and the record supports this finding.

8. We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925.

C.

[4] Graham next argues that even if the Texas statute is constitutional, his trial attorney was rendered ineffective because the attorney construed the statute as precluding the consideration of mitigating factors. As indicated by the affidavit of Graham's trial attorney, the attorney was not in any way discouraged by the statute from presenting mitigating evidence of Graham's psychiatric treatment; rather, his decision not to pursue this course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced.[10] The attorney's concern was justified because, as the Supreme Court has noted in *Buchanan v. Kentucky*, — U.S. —, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987), "if a defendant ... presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant released." Finally, during the sentencing phase, Graham's attorney did obtain mitigating testimony from Graham's stepfather and grandmother concerning his childhood. The evidence reflects no other witnesses who could or would present relevant evidence on Graham's behalf. Graham's present contention that his trial attorney was ineffective because he introduced little mitigating evidence is therefore meritless.

D.

[5] In Graham's fourth contention, he alleges that he is not presently competent to be executed. Graham relies on post-trial reports filed by psychiatrists Dorothy Lewis and Johnathan Pincus and contends that there is evidence of considerable organic impairment, moderate retardation, and psychotic symptoms.

The state court, in examining these contentions, noted that Graham was examined by two psychiatrists at the time of trial and was adjudged competent to stand trial. In reaching its decision that Graham was competent both at trial and presently, the state district court stated that it

> carefully considered (1) all the psychiatric material submitted by both the applicant and the respondent, and (2) the applicant's demeanor and abilities as he testified at the evidentiary hearing held January 8, 1988. While the reports from Dr. Dorothy Otnow Lewis and Dr. Jonathan H. Pincus suggest that the applicant is mildly brain damaged, of low intelligence, and has experienced 'bipolar mood disorders,' there is nothing in the reports or evidence from any other source to indicate that the applicant is either insane or that he does not know the fact of his impending execution and the reason for it.

9. Graham also argues that the Texas statute is unconstitutional because testimony concerning unadjudicated extraneous offenses was allowed during the punishment phase of the trial. In *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987), this court rejected a similar argument and concluded that "admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments." 814 F.2d at 208. We stand by this decision.

10. Graham's attorney believed that the prosecution's witnesses would testify that Graham was "faking" his mental problems, that he was manipulative of others, and that he had told them it was "O.K. to rob people."

Moreover, the state court found that Graham was examined by Dr. Jerome Brown in January 1987 and found competent to participate in the habeas evidentiary hearing and assist his attorney. Thus the state court held that there was "no credible evidence from any source to indicate that the applicant is not competent to be executed." Under *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981), the state court's findings must be given a presumption of correctness unless one of the conditions provided in section 2254(d) is established. *See also Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The most relevant consideration listed in section 2254(d) is whether the trial court's factual findings are "fairly supported by the record." Clearly, there is competent evidence supporting the state court's finding that Graham is competent to be executed; indeed, the petitioner cannot seriously argue that there is not. We therefore hold that Graham's contention is meritless.

E.

[6] Graham's fifth contention is that he was denied his right to effective assistance of counsel in violation of his fourth, sixth and fourteenth amendment rights. Graham's particularized grounds are that his counsel:

(1) failed to conduct an adequate pretrial investigation,

(2) failed to interview all the witnesses,

(3) failed to obtain a third psychological-psychiatric examination,

(4) failed to conduct an adequate cross-examination of the state's key witness,

(5) failed to bring forth proper alibi witnesses,

(6) failed to request a limiting instruction concerning extraneous offenses,

(7) failed to develop a proper trial strategy,

(8) failed to provide proper clothing for the petitioner during trial,

(9) failed to call more than two witnesses during the punishment phase of Graham's trial,

(10) failed properly to investigate the alleged extraneous offenses admitted into evidence against Graham,

(11) failed to order an independent psychiatric examination of Graham, and

(12) failed to allow Graham to testify at the guilt/innocence phase or the punishment phase of the trial.

The affidavit submitted by Graham's original defense counsel has a particular bearing on these assertions. The state court credited Graham's trial counsel and determined that Graham's counsel had conducted himself in a competent manner. For example, the state court's factual findings show that Graham's counsel met with Graham on numerous occasions to discuss the case with him. Graham stated only that he did not commit the crime and did not inform his attorney of any witnesses who would support his contention or explain where Graham had been at the time the crime occurred. The state court specifically determined that the alibi witnesses upon whom Graham now relies were never available to Graham's trial attorney. Moreover, the court found that three of the four alleged alibi witnesses did not offer credible testimony.[11] The defense counsel also hired an investigator to interview possible witnesses, and filed a motion for sanity and competency evaluation. It was further found that counsel had valid reasons for failing to request a third independent psychiatric evaluation of Graham.[12] Counsel also used his personal funds to buy Graham suitable clothing for the trial. Counsel further attempted to obtain numerous mitigation witnesses, but only two would agree to testify favorably for Graham. Credited testimony showed that counsel advised Graham that he had the right to testify but counsel's legal view was that Graham would not present himself as a sympathetic witness. Furthermore, the state court determined that the counsel's cross-examination of the state's key witness was not affected by the fact that counsel had attended the same high school. Finally, the court found that the defense counsel had good cause for not objecting to the state's challenge of certain veniremen, and that counsel made a reasonable investigation of certain extraneous evidence admitted during the punishment phase of the trial. In short, the state court found against Graham on every issue of fact upon which he predicated his ineffective counsel claim and concluded that counsel had competently and effectively represented Graham.

Having reviewed the record and the state court's findings of fact, we must conclude that Graham has failed to overcome the presumption that the state court's findings were correct. *See Sumner v. Mata*, 101 S.Ct. at 771. Graham has failed to present a meritorious challenge on this issue.

11. The witnesses submitted a written affidavit over five years after Graham's conviction for capital murder. One witness testified that the affidavit was prepared by a third party and the witnesses only signed the statement.

12. Graham's prior psychiatric evaluations were consistent and showed that Graham was competent to stand trial. This comported with defense counsel's own view of his client's competency.

F.

[7] In Graham's sixth point of error, he makes a broadside attack on the Texas death penalty statute, alleging that it violates the fourth, fifth, sixth, eighth and fourteenth amendments to the Constitution. In particular, Graham maintains that the Texas capital punishment system produces arbitrary results and does not provide proportionality. This contention lacks merit in view of the Supreme Court's holdings in *Franklin v. Lynaugh*, — U.S. —, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In *Franklin*, although the issue of proportionality was not directly before the Court, Justice White did note that the Texas capital sentencing scheme properly structured jury discretion. — U.S. at —, 108 S.Ct. at 2331. The Court more directly addressed this issue in *Jurek* when it stated:

> Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the even-handed, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.

96 S.Ct. at 2958. *See also McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 879, 79 L.Ed.2d 29 (1984). We therefore reject Graham's contentions.

G.

[8] Graham also asserts for the first time that his due process and equal protection rights were violated because individuals under eighteen-years old were statutorily excluded from the grand and petit jury and, in addition, blacks were substantially and systematically excluded. The state court specifically found that the peremptory challenges against blacks resulted from the veniremen's testimony that they were opposed to the death penalty. Since the state court has reviewed the record and concluded that Graham has failed to build a prima facie case of discrimination in either the grand or petit jury selection, we must concur with the state court's decision. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1722, 90 L.Ed.2d 69 (1986); *see also Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *United States v. Cronn*, 717 F.2d 164, 168 n. 7 (5th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3586, 82 L.Ed.2d 884 (1984).

Finally, we know of no case law which suggests that exclusion of eighteen-year-olds is unconstitutional, and Graham has failed to show how such an exclusion has denied him a fair jury trial. *See Carter v. Jury Commission*, 396 U.S. 320, 90 S.Ct. 518, 525, 24 L.Ed.2d 549 (1970).[13]

III

In conclusion, the petitioner has not made a substantial showing of a denial of a federal right and we therefore must deny his petition for a certificate of probable cause.

However, because the Supreme Court has granted certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir.1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), and *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), we will continue our stay until 12:01 a.m., September 30, 1988, in order to give Graham an opportunity to petition the Supreme Court for certiorari; and, if a petition is filed, this stay shall continue in effect until such time as the Supreme Court has acted.

PETITION FOR CERTIFICATE OF PROBABLE CAUSE DENIED.

13. As a last point of contention, Graham objects to the federal district court's summary dismissal of his claim. He argues that the district court conducted an ex parte investigation without giving him the opportunity to file an answer. Finally, Graham alleges that the district court did not provide him an opportunity to inspect and review all documents that it considered. He contends that these omissions violated 28 U.S.C. § 2254, Rules 4 and 5. These assertions are hollow. Rules 4 and 5 do not bind the district courts in such a manner. In any event, Graham has not shown any prejudice arising from these alleged deprivations.

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APPENDIX F

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
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2-24-88
JESSE E. CLARK, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GARY GRAHAM,

Petitioner,

V.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

Respondent.

CIVIL ACTION NO. H-88-563

MEMORANDUM ON THE DENIAL OF A
STAY OF EXECUTION AND WRIT OF HABEAS CORPUS

1. Statement

Gary Graham is sentenced to die by injection before sunrise tomorrow, February 25, 1988, and has applied for a writ of habeas corpus and moved to stay his execution. In addition to the pleadings and exhibits filed in this Court, the Court has had before it for its consideration prior to the issuance of this Memorandum and Order the entire 20-volume transcript of the state court proceedings, the transcript of the state court habeas corpus evidentiary hearing held on January 8, 1988, the findings of fact and conclusions of law of the state court, and the opinions of the Texas Court of Criminal Appeals relevant to this case. Both the writ of habeas corpus and stay of execution are denied.

2. Background

Graham was convicted of capital murder and sentenced to death for the shooting death of Bobby Grant Lambert during a

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Court on November 9, 1987, on the issue of whether sentencing a defendant to death, who was 15 years old at the time of the offense, constitutes cruel and/or unusual punishment. See Thompson v. State, 724 P.2d 780 (Okla. Crim. App. 1986), cert. granted, ____ U.S. ____, 107 S. Ct. 1284 (1987). As previously stated, the Petitioner was 17 years of age at the date of the incident in question.

6. Unconstitutionality of the Texas Death Penalty Statute

Graham asserts that he was convicted under an invalid Texas death penalty statute, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987-88), because jury question number two during the penalty phase of trial improperly "precluded the jury in Petitioner's case from considering various types of mitigating evidence." The United States Supreme Court has recently reaffirmed that the Texas death penalty statute permits "the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator." Lowenfield v. Phelps, 56 U.S.L.W. 4071, 4075 (U.S. Jan. 13, 1988) (citing Jurek v. Texas, 428 U.S. 262, 271-274 (1976)). Therefore, this Court finds Graham's argument is without merit.

Graham also claims that the Texas statute is unconstitutional in that it "rendered trial counsel legally ineffective by forcing him to fail to present relevant mitigating evidence." Graham references the Court to Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). Additionally, Graham urges that the statute's failure to define mitigating circumstances renders Graham's conviction unconstitutional, citing Franklin v. Lynaugh,

823 F.2d 98 (5th Cir. 1987), cert. granted, 46 U.S.L.W. 3287 (U.S. Oct. 9, 1987).

As Jurek expressly held that the Texas statute is constitutional, this Court also so holds. This Court has also considered Graham's argument regarding the trial court's failure to instruct the jury regarding mitigating circumstances due to the state district court's factual finding that defense counsel failed to object, but finds that Graham has not demonstrated that the charge as a whole was so clearly erroneous as to result in a grave miscarriage of justice. United States v. Varkonyi, 645 F.2d 453, 460 (5th Cir. 1981) (citing United States v. Franklin, 586 F.2d 560, 569 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979)).

7. Petitioner's Present Competency to be Executed

Graham's fourth claim is that he is not competent to be executed under the standard set forth in Ford v. Wainwright, ____ U.S. ____, 106 S. Ct. 2595 (1986).

Although Graham attached psychiatric reports to his petition which were dated June and July, 1986, the most recent evaluation of Graham's competency occurred on August 25, 1987. Dr. Jerome B. Brown found that Graham exhibited "no credible signs of severe psychiatric disturbance or psychological impairment that seems genuine." After the evidentiary hearing on January 8, 1988, the state district court found that there was "no credible evidence from any source to indicate that [Graham] is not competent to be executed."

This Court finds that Graham has failed to make a showing that he is not competent to be executed.

8. Ineffective Assistance of Counsel

Graham suggests that he was denied effective assistance of counsel at the trial because of numerous alleged shortcoming of defense counsel.

A two-prong test for determining ineffective assistance of counsel has been established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). First, Petitioner must show that counsel's performance was deficient which requires "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 680. Second, Petitioner must show that the deficient performance prejudiced his defense such that he was deprived of a fair trial. Id. Further, competency of representation is not to be judged by hindsight or by facts unknown at the time of trial. Id.

Graham alleges twelve separate assertions of purported errors or omissions by his trial counsel team.

A. Graham alleges that counsel failed to conduct an adequate pretrial investigation of the case by failing to interview all of the witnesses and all possible mitigation witnesses. The state district court found that Graham did not furnish counsel with the names or addresses of the potential alibi witnesses. This Court finds that counsel's actions were reasonable based on the information supplied them by Graham at the time.

B. Graham asserts that counsel failed to obtain an independent psychological-psychiatric examination for purposes of mitigation. Defense counsel were not ineffective for failing to request a third psychological evaluation of Graham as both doctors who had previously examined him reached similar conclusions declaring him both sane and competent. See Beans v. Black, 757 F.2d 933, 936 (8th Cir. 1985) (defense counsel's failure to obtain second opinion regarding defendant's competency was not unreasonable under Strickland).

C. Graham claims that counsel Ron Mock knew personally the State's key witness and failed to disclose this personal relationship to Graham. The state district court made the factual finding that Ron Mock did not have any personal relationship with the State's eyewitness, Bernadine Skillern, and that there was no credible evidence to believe that Ron Mock had a conflict-of-interest with his client. This Court finds that Graham has not demonstrated that an actual conflict of interest arose. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (citing Glasser v. United States, 315 U.S. 75-76 (1942)) (a defendant who raised no objection at trial must demonstrate that an actual conflict of interest affected his attorney's performance).

D. Graham also asserts that defense counsel was made aware of at least four witnesses who could testify as alibi witnesses. The state district court found that the names and addresses of the four potential alibi witnesses were never given to counsel. This Court has examined the affidavit of counsel

attached to the transcript of the evidentiary hearing held January 8, 1988, and also finds that counsel did not fail to investigate or produce witnesses of which he was informed. This Court finds no indication of ineffective assistance in counsel's actions.

The Court has also considered Graham's additional allegations of ineffective assistance of counsel: "counsel knowingly allowed the petitioner to be tried in the same clothes that he was wearing on the date of his arrest"; "counsel refused to allow the petitioner to testify in his own behalf at the guilt-innocence phase or at the punishment phase"; "petitioner's counsel totally failed to develop a proper trial strategy"; "petitioner's counsel totally failed to request a limiting instruction at the punishment phase of the trial concerning the extraneous offenses which were introduced into evidence"; "petitioner's counsel only called two witnesses to testify in mitigation of the petitioner's punishment"; "petitioner's court-appointed counsel failed to call . . . four witnesses [who] were with the petitioner on the alleged date of the offense"; and "Attorney Mock 'discovered from listening to testimony that one of the robberies committed by Graham took place within a few yards of Mock's house in southeast Houston' according to Houston Chronicle reporter Alan Bernstein." The Court, based upon an examination of the record, finds that all of these allegations of Petitioner are without merit.

9. Unconstitutionality of the Texas Death Penalty Statute

Claim VI of Graham's petition asserts additional grounds for the unconstitutionality of the Texas death penalty statute: (1) lack of "sentence review," (2) lack of comparing death sentences on a state-wide basis resulting in disparity of punishments, (3) lack of trifurcated system, (4) lack of informing the jurors of the result of their answers to the special issues, and (5) admissibility of unadjudicated offenses.

As stated above, this Court finds Jurek, 428 U.S. at 262, controlling and finds the Texas death penalty statute constitutional.

10. Exclusion of Jurors

Graham is a black male who was under eighteen years of age at the time of the commission of the offense. Graham urges that (1) blacks were systematically excluded from the jury panel pursuant to Witherspoon; (2) the Grand Jury was substantially under-represented by blacks and all individuals under 18 were excluded from service; (3) the trial jury was substantially under-represented by blacks and all individuals under 18 were excluded from jury service; and (4) the district attorney prevented the jury from being representative of blacks by his use of challenges for cause and peremptory challenges.

Graham has failed to prove that pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968), blacks were systematically excluded from the jury panel by challenges for cause because allegedly a larger percentage of blacks are against the death penalty.

Graham has also failed to show that the grand jury and the trial jury was under-represented by blacks for any reason. Mere conclusory allegations in an application for federal habeas relief fail to rise to a prima facie showing of discrimination and fail to trigger Batson v. Kentucky. Esquivel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986) (referencing Batson v. Kentucky, ____ U.S. ____, 106 S. Ct. 1712, 1722-1723 (1986)); see also McClenskey v. Kemp, ____ U.S. ____, 107 S. Ct. 1756, 1766 (1987) (equal protection violation requires showing that decision makers acted with "discriminatory purpose").

Graham has also not shown that the exclusion of all individuals under the age of 18 violated his right to a fair and impartial trial.

SIGNED at 7:10 p.m. on February 24, 1988, at Houston, Texas.

DAVID HITTNER
United States District Judge

TRUE COPY I CERTIFY
ATTEST:
JAMES R. CLARK, Clerk
By Michael Coyne
Deputy Clerk

ORIGINAL

No. 91-7580

Supreme Court, U.S.
FILED
MAY 8 1992
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals below correctly determined that Texas' special issues provided an adequate vehicle under the Eighth Amendment for consideration of Petitioner's youth, positive character traits and family background.

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NO. 91-7580

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

GARY GRAHAM,

Petitioner,

v.

JAMES A COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief to Petitioner, hereinafter "Graham," is reported at 950 F.2d 1009 and attached to the petition as an appendix.

JURISDICTION

Graham seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Graham bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Graham was convicted in the 182nd Judicial District Court of Harris County, Texas, on October 28, 1981, of the capital offense of murder of Bobby Grant Lambert during the course of committing robbery. After a separate hearing on punishment, resulting in the jury's affirmative responses to the two special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1991), a death sentence was assessed on October 30, 1981. Graham's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on June 12, 1984. *Graham v. State*, No. 68,916 (Tex. Crim. App. 1984). Certiorari review was not sought.

After an execution date was scheduled for July 30, 1987, Graham sought state habeas corpus relief. The execution date was rescheduled on three occasions, during which time a competency examination was conducted, the trial court held an evidentiary hearing, and state habeas relief was denied by the Court of Criminal Appeals. *Ex parte Graham*, No. 17,568-01 (Tex. Crim. App. Feb. 19, 1988).

On February 23, 1988, two days prior to his scheduled execution date of February 25, 1988, Graham filed a petition for writ of habeas corpus and moved for a stay of execution in the United States District Court for the Southern District of Texas, Houston Division. The next day, the district court denied the writ and the stay application, but a panel of the United States Court of Appeals for the Fifth Circuit stayed Graham's execution. On August 31, 1988, the panel affirmed the district court's judgment. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir. 1988). However, on July 3, 1990, this Court vacated the Fifth Circuit's judgment and remanded the case for reconsideration in light of the decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

On remand and after supplemental briefing, the panel, Judge Jolly dissenting, reversed the judgment of the district court on March 7, 1990, and ordered the case remanded to the district court. *Graham v. Collins*, 896 F.2d 893 (5th Cir. March 7, 1990). On June 4, 1990, however, the court of appeals granted Respondent's suggestion for rehearing *en banc*. *Graham v. Collins*, 903 F.2d 1014, (5th Cir. 1990) (en banc). On January 3, 1992, the *en banc* court affirmed the district court's denial of habeas corpus relief. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc).

B. Statement of Facts

In the evening of May 13, 1981, Bobby Grant Lambert, having just purchased groceries, was accosted in the grocery's parking lot by Graham, who attempted to rob him. After Lambert resisted Graham's robbery attempt, Graham pulled a pistol and put it to Lambert's head. Lambert then dropped his groceries, at which time Graham shot him in the chest. As Graham quickly walked away, Lambert stumbled back into the grocery store, where he died.

At the punishment phase of trial, the state introduced evidence that in nine separate incidents occurring within one week of his commission of capital murder, Graham committed nine aggravated robberies, armed with either a pistol or a shotgun, against thirteen victims. Among other things, Graham shot one individual in the neck, pistol whipped three individuals, stole five vehicles at gunpoint, and kidnapped and raped one individual. On May 14, 1981, Graham entered Clinton Jones' van, where he pulled a pistol and pointed it at Jones' head. After taking Jones' watch and wallet, Graham struck Jones with the pistol five times and then

shot him in the neck. Graham then stole Jones' van. Later that evening, Graham approached Linda Jennings and a friend as they were washing a friend's Cadillac at a carwash. Graham entered the car, pulled a pistol out and pointed it at Jennings' friend and then at Jennings. Graham then drove off in the Cadillac.

On May 15, 1981, Graham approached Yale Salsgiver in a parking lot and requested a ride, to which Salsgiver agreed. While in Salsgiver's truck, Graham pulled a shotgun, and he and Salsgiver struggled for possession of the gun. Salsgiver was able to escape, and Graham drove off in the truck. At approximately 6:30 p.m. on the same day, Graham approached Emory Dedman in his office's parking lot and requested a jumpstart for his van. As Dedman raised the hood of his Cadillac, Graham pulled a shotgun out and forced Dedman into the van, forced him to kneel in the van, relieved him of his watch, money and car keys, and drove off in Dedman's Cadillac. Later that evening in yet another parking lot, Graham pulled a shotgun on Richard Carter, forced him to kneel behind Carter's car, relieved Carter of his wallet, money, tool box and hat while keeping the shotgun one inch from Carter's head. Graham then struck Carter with the shotgun and left in his own car. Later that evening in the same parking lot, Carter again encountered Graham, who again brandished the shotgun.

On May 18, 1981, Graham and a second man approached Ernest Doakes in an apartment complex parking lot, where Graham entered Doakes' car, stuck a pistol in Doakes' ribs, and took Doakes' money. Graham and the second man drove off in Doakes' car. Also on May 18, Graham approached Mohen Nemefolli and a friend in a hotel parking lot, where he pulled out a pistol and demanded money from the friend. When Nemefolli objected, Graham hit him with the pistol and then stuck the pistol in Nemefolli's face. Graham absconded with a wallet, money and jewelry.

On May 19, 1981, Graham approached Richard Sanford in a parking garage, where he pulled a gun, announced his intent to rob Sanford and forced Sanford into Sanford's car. There, he pointed the gun at Sanford's stomach, relieved Sanford of his watch, ring, wallet and money, and threatened to kill Sanford. Graham ordered Sanford out of the car, again threatening to kill him, and frisked Sanford. Graham then left the area on foot.

On May 20, 1981, Graham requested a ride from Lisa Blackburn, a cab-driver. While in the cab, Graham pulled out a pistol and took Blackburn's wallet, money and some personal property from the trunk of the cab. Graham then threatened to rape Blackburn, hit her in the face and forced her to drive to an abandoned apartment. Forcing her inside the apartment, Graham fondled Blackburn's genitalia, raped her vaginally and then attempted to rape her anally. Graham then forced Blackburn to drive to her apartment, where Graham gathered some of her property and instructed her to orally copulate him. However, Graham then fell asleep, at which time Blackburn took his pistol and called the police. Graham was then arrested.

The state further introduced testimony from a juvenile probation officer regarding Graham's bad reputation.

Graham produced the testimony of his stepfather and grandmother during the punishment phase of trial, Graham's stepfather, Joe Samby, testified that Graham, who lived and worked with his father, would visit his mother once or twice a week. Graham was very nice, would do chores around the house when requested, never fought with Samby and was never violent. Graham loved and was very close to his mother, a "nervous type" who was currently on medication, and Graham had two children, for whom he tried very hard to provide food and clothes.

Graham's grandmother, Erma Chron, testified that Graham stayed with her intermittently, beginning at age three, because his mother was hospitalized numer-

ous times for a nervous condition that Chron classified as mental illness. While Graham was living with Chron, he attended church and school, was never violent and never possessed any weapons or caused any problems. Graham went to live with his father at age eleven or twelve.

Graham introduced no other evidence.

SUMMARY OF ARGUMENT

There is no special or important reason for this Court to exercise its certiorari jurisdiction in this case. The rule Graham seeks, that youth is mitigating *per se,* regardless whether a defendant possesses any of the attributes of youth that cause it to be mitigating in a societal and constitutional sense, flies in the face of the Eighth Amendment's requirement of an *individualized* sentencing decision and was properly rejected by the *en banc* court below.

The court below properly considered and reconciled all of this Court's Eighth Amendment precedent in the area of sentencer consideration of mitigating evidence in the context of the Texas capital sentencing procedures. It correctly concluded that any mitigating aspects of Graham's youth could be given full effect in answering Texas' "deliberateness" and "future dangerousness" special issues. To the extent Graham's crime was attributable to aspects of the transitory condition of youth, the future dangerousness issue allowed the jury to give mitigating effect to that evidence.

Likewise, Graham's jury was able to consider and give mitigating effect to his good character evidence and the circumstances of Graham's youth, wherein his mother had a possible mental illness. The evidence was offered and demonstrated that Graham's criminal behavior was an aberration from his otherwise good character, and the court below, applying the proper constitutional analysis, properly rejected the claim.

by Graham. *Graham v. Collins,* 950 F.2d 1009, 1026-1030 (5th Cir. 1992) (en banc). Rather, it found *Penry* inapplicable "where no major mitigating thrust of the [mitigating] evidence is substantially beyond the scope of all the special issues." *Id.* at 1027. The Court further stated:

> We believe that what *Penry* represents is a set of atypical circumstances of a kind that, quite understandably, neither the Texas Court of Criminal Appeals nor the Supreme Court in *Jurek* had in mind, namely circumstances where the defense's mitigating evidence would have either no substantial relevance or only adverse relevance to the second special issue. Typically, evidence of good character, or of transitory conditions such as youth or being under some particular emotional burden at the time, will tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is or may become over time, and that the defendant may be rehabilitable so as not to be a continuing threat to society. The core of *Jurek*-- which we cannot conclude has been abandoned -- is that the mitigating force of this kind of evidence is adequately accounted for by the second special issue. But in *Penry* the Court was faced for the first time with a wholly different type of mitigating evidence. Not evidence of good character, but of bad character, not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but *nonetheless* evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue. To recognize that, as *Penry* did, is not necessarily to deny the validity of *Jurek* as it applies to the more typical case.

Graham, 950 F.2d at 1029-30.

Further, the *Graham* court recognized and applied this Court's description of the manner in which character or background evidence attains constitutional mitigating value relevant to a defendant's culpability.

> "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . *Lockett* and *Eddings* reflect a belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Penry v. Lynaugh,* 492 U.S. at 319, 109 S.Ct. at 2947; *Graham,* 950 F.2d at 1031. Absent a nexus between the mitigating aspects of the defendant's character or background and his behavior, the evidence cannot reflect that he is less morally culpable than any other citizen. *See Graham,* 950 F.2d at 1031 (youth does not reflect a reduced culpability for conduct not attributable to it).

Finally, if the jury is able to consider and give effect to the mitigating force of the proffered evidence within the context of one of the statutory inquiries, the failure to provide additional instructions or vehicles by which the jury can consider and give effect to that evidence does not violate the Eighth Amendment. The Constitution does not require that the sentencer be permitted to give effect to the defendant's evidence in whatever manner or to whatever extent the defendant desires.[1]

---

1 In *Saffle v. Parks*, 494 U.S. at ___, 110 S. Ct. at 1261, this Court noted that, while the holdings of *Eddings* and *Lockett* govern what factors the jury must be permitted to consider in making its sentencing decision, the Court has never promulgated "rules that govern how the State may guide the jury in considering and

Rather, the defendant is entitled only to *a* fair vehicle by which the sentencer can give effect to the mitigating force of his evidence. *See Boyde v. California,* 494 U.S. 370, ___ n.5, 110 S. Ct. 1190, 1199 n.5 (1990); *Saffle v. Parks,* 494 U.S. at ___, 110 S. Ct. at 1261; *see also Penry v. Lynaugh,* 492 U.S. at 321 (no Eighth Amendment violation in *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320 (1988), because jury able to give effect to the mitigating force of evidence).

Recognizing this Court's holding in *Saffle,* the unique factual circumstances of *Penry,* and the similarity of the evidence Graham presents with that of the defendant in *Jurek v. Texas,* the *Graham* Court correctly reasoned that *Penry*'s rule was applicable where a major mitigating thrust of the evidence is substantially beyond the special issues. 950 F.2d at 1027; *see also id.* at 1031-32 & n.28 (defendant is not entitled to additional vehicle for consideration of mitigating evidence where there is nothing in the record to suggest that defense counsel desired to have evidence considered in another manner). Graham's evidence, as offered, does not implicate *Penry*. The major mitigating thrust of his youth could be given full effect in answering the second special issue, whether there was a probability that Graham would commit criminal acts of violence that would constitute a continuing threat to society.

> [W]hatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inferences that, as his youth passes, he will no longer be a danger to society.

Graham, 950 F.2d at 1031; *accord Wilkerson v. Collins,* 950 F.2d 1054, 1060-61 (5th Cir. 1992).[2] There is no indication that Graham desired the evidence to be considered for any purpose other than to show a lack of future dangerousness.

Graham relies on *Eddings v. Oklahoma,* 455 U.S. 104 (1982), and *Stanford v. Kentucky,* 492 U.S. 361 (1989), in urging a rule that youth is mitigating *per se,* regardless whether an individual defendant possesses mitigating qualities associated with youth. As this Court recognized, as a general rule, youths lack the maturity to be fully aware of the consequences of their actions and tend to be impulsive. However, the Court likewise recognizes that the general rule is not applicable to every member of the class of youthful defendants.

> Granting the plurality's other premise -- that adolescents are *generally* less blameworthy than adults who commit similar crimes, it does not necessarily follow that *all* 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment.

Thompson v. Oklahoma, 487 U.S. 815, ___, 108 S. Ct. 2687, 2708 (1988) (O'Connor, J., concurring) (emphasis added).

> Our history is replete with laws and judicial recognition that minors . . . *generally* are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors *often* lack the experience, perspective, and judgment" expected of an adult.

---

weighing those factors in reaching a decision." "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. at ___, 110 S. Ct. at 1196 (1990), *citing Franklin v. Lynaugh*, 487 U.S. at 181 (plurality opinion).

2 While the *Graham* court focused on the second special issue, it further noted that mitigating aspects of youth could be adequately considered under the first and third special issues, which served to reinforce the court's conclusion that Graham was not entitled to relief. 950 F.2d at 1033 n.30.

Eddings, 455 U.S. at 115-16. Further, in relying on *Eddings,* Graham ignores the *ratio decidendi* of that case, as explained by Justice O'Connor in *California v. Brown,* 479 U.S. at 545, and incorporated by this Court in all subsequent cases addressing the issue of consideration of mitigating evidence, that punishment should be directly related to personal culpability and that a disability attains societal, and thus constitutional, significance where behavior is attributable to that disability.

Graham cannot legitimately contend that the general attributes of youth that render it mitigating in society's eyes cannot be fully considered under the "deliberateness" and "future dangerousness" special issues submitted in all Texas capital cases. Likewise, he cannot legitimately claim that there is any evidence that establishes, or even suggests, that Graham actually possessed any of those attributes of youth that render it mitigating in society's perception, thereby attaining Eighth Amendment's significance, as set forth in *Brown.* Thus, at best, Graham seeks a rule allowing a jury, after fully considering the mitigating aspects of his youth, weighing the aggravation and mitigation and finding that mitigation did not raise a reasonable doubt as to the special issues, to still be able to confer a grant of mercy based on the biological fact of his age. The State has a legitimate interest in preventing such unguided discretion. *Saffle v. Parks,* 494 U.S. at ___.

As the court of appeals below correctly recognized, Graham, relying on Eighth Amendment authority mandating an *individualized* sentencing decision, claims entitlement to relief not because of *individual* attributes, but because of his *status* as a seventeen-year-old offender. This claim flies in the face of the Eighth Amendment's requirement of a rational individualized sentencing decision and should be categorically rejected. *Graham,* 950 F.2d at 1030 n.25, 1031 n.26.

Likewise, the court of appeals below correctly rejected Graham's claim that the jury could not give mitigating effect to his positive character evidence and his background evidence, consisting of his mother possible mental illness. The court

below correctly noted that, unlike negative character or background evidence that may offer an "excuse" for behavior, positive character evidence demonstrates that a defendant's criminal behavior is an aberration from his otherwise good behavior.

> Unlike *Penry* type disability evidence, which can reduce culpability where it is inferred that the crime is attributable to the disability while other similar offenders have no such "excuse," good character evidence provides no variety of "excuse." Further, absent some unusual indication of an essentially *permanent* adverse *change* in character (e.g., brain damage), to the extent that the testimony is convincing that the defendant's general character is indeed good it will also, to essentially the same extent, be convincing that he will not continue to be a threat to society.

Graham, 950 F.2d at 1033. Further, in addressing the evidence of Graham's mother's mental problems, the court below correctly concluded that it did not implicate *Penry,* stating:

> the entire context in which this testimony was presented . . . suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like, or that he had any mental or psychological problems. The entire thrust of the defense evidence, from both Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems," as Justice O'Connor used those terms in *Penry.*

Id. Employing this Court's reasoning in *Boyde,* the court of appeals properly concluded that Graham's evidence, as offered, demonstrated that his basic character is good and that his criminal behavior is aberrational. *See Boyde,* 470 U.S. at ___ & n.5. A Texas jury can give full mitigating effect to this evidence in answering the

second special issue, whether the defendant will continue to commit criminal acts of violence that will constitute a continuing threat to society.

In its thoughtful and carefully reasoned opinion, the *en banc* court below adopted a rule designed to harmonize the decisions of this Court that identify constitutionally recognized sentencing concerns, *California v. Brown*, 479 U.S. at 545 (personal culpability); *Penry v. Lynaugh* (same); *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) (capacity for rehabilitation or lack of future dangerousness), and that identify classes of potentially mitigating evidence, *Woodson v. North Carolina*, 428 U.S. 280 (1976) (character, record, circumstances of the offense); *Lockett v. Ohio*, 438 U.S. 536, 604 (1978) (same). The court of appeals' decision properly reconciles, in the context of Texas' capital sentencing procedures, this Court's precedent in the area of sentencer consideration of mitigating evidence. Certiorari does not lie to review the correct application of the proper legal standard, as embodied in these two lines of cases, to the particular facts of Graham's case.

CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the district court be affirmed and the stay of execution be vacated.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

MICHAEL P. HODGE
Assistant Attorney General
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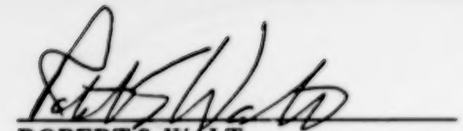

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ATTORNEYS FOR RESPONDENT

Office of the Attorney General
State of Texas

DAN MORALES
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May 8, 1992

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Gary Graham v. James A. Collins*, No. 91-7580

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine typewritten copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

ROBERT S. WALT
Assistant Attorney General
(512) 463-2080

RSW/kh
Enclosures
c: Michael E. Tigar
University of Texas School of Law
727 East 26th St.
Austin, Texas, 78705

512/463-2100 P.O. BOX 12548 AUSTIN, TEXAS 78711-2548
AN EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE

No. 91-7580

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 8th day of May, 1992, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Michael E. Tigar, University of Texas School of Law, 727 East 26th St., Austin, Texas, 78705. All parties required to be served have been served. I am a member of the Bar of this Court.

ROBERT S. WALT
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ATTORNEY FOR RESPONDENT

ORIGINAL

No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,

Petitioner,

V.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPTARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis were served on counsel for Respondent by placing same into the U.S. Mail, first-class postage prepaid, addressed to: Enforcement Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 6th day of March, 1992. I further certify that all parties required to be served have been served.

Michael E. Tigar
Member, Supreme Court Bar

Texas Resource Center

(713) 522-5917
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Vieux Carre Building
3223 Smith Street
Suite. 215
Houston, Texas 77006

March 9, 1992

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SUPREME COURT, U.S.

Mr. Jeff Atkins
Office of the Clerk
United States Supreme Court
1 First Street N.E.
Washington, D.C. 20543
202/479-3011

Re: Graham v. Collins, No. _____

VIA FEDERAL EXPRESS

Dear Mr. Atkins:

Enclosed for immediate filing please find enclosed two copies of Appendix F (Memorandum on the Denial of a Stay of Execution and Writ of Habeas Corpus, Graham v. Lynaugh, No. H-88- 563, S.D.Tex (February 24, 1988)) to Mr. Graham's **Petition for Writ of Certiorari**. As we discussed today on the telephone, this document was inadvertently left out of the Petition as filed on March 9.

Thanks so much for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

Robert C. Owen, by express permission
Jane B. Tigar

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Attorney at law

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March 6, 1992

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RECEIVED
MAR - 9 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Re: **Graham v. Collins**, No. _____.

VIA FEDERAL EXPRESS

Dear Sir/Madam,

Enclosed for immediate filing please find enclosed one original **Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis** in the above-captioned case. Mr. Graham's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Motion for Leave to Proceed In Forma Pauperis should arrive in this Court via Federal Express, under separate cover from this Affidavit, on March 9, 1992. I will contact you by telephone to confirm the filing of these papers. If you have any questions, please do not hesitate to call.

Sincerely,

* MICHAEL E. TIGAR
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* Counsel of Record for
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ORIGINAL

Supreme Court, U.S.
FILED
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No. 91-7580

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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QUESTIONS PRESENTED IN MR. GRAHAM'S PETITION FOR WRIT OF CERTIORARI

May a State limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted "deliberately" and might be dangerous in the future, and afford no other basis for taking his youth into account?

May a State similarly limit the jury's consideration of such a defendant's positive character traits and the unfortunate circumstances of his family background?

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No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

To assist the Court, Petitioner Gary Graham provides this Reply to Respondent's Brief in Opposition.[1]

I.

THE ISSUE PRESENTED BY MR. GRAHAM'S CASE IS SUBSTANTIAL AND RECURRING.

The constitutional question in Mr. Graham's case is central to this Court's sixteen-year effort to develop principles of capital sentencing to permit juries to effect a "reasoned moral response" to the defendant's background and character, as well as to the circumstances of the offense. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 322 (1989). Respondent's contention that "no special or important reason" counsels this Court's exercise

[1] The en banc opinion of the United States Court of Appeals for the Fifth Circuit has been published. Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc).

of its certiorari jurisdiction to hear Mr. Graham's case, see Respondent's Brief in Opposition to Petition for Writ of Certiorari (hereinafter Respondent's Brief) at 3, denies the reality of the sharp division in the en banc Fifth Circuit. Only days ago, Justice Stevens acknowledged the substantial character of the question Mr. Graham presents for review, noting the narrow margin by which the Court of Appeals denied him relief. Romero v. Texas, ___U.S.___, No. A-854 (91-7914) (May 19, 1992) (Stevens, J., joined by Blackmun and Kennedy, JJ., dissenting from denial of stay of execution). We showed in the Petition, and show more fully below, why this is so.

II.

THE MAJORITY OPINION IN THE COURT BELOW SUBSTANTIALLY DEPARTS FROM THIS COURT'S SETTLED PRECEDENTS CONCERNING THE CONSIDERATION OF MITIGATING EVIDENCE.

Respondent concedes that the court below circumscribed the mitigating value of Mr. Graham's youth. See Respondent's Brief at 9-12. Respondent characterizes these unprecedented limitations as "recogniz[ing] and appl[ying]" this Court's teaching concerning the Eighth Amendment. Id. at 9. In fact, however, this Court's cases require the opposite result from that reached by the slender majority of the Court of Appeals. Moreover, the Fifth Circuit's application of its Graham rationale in more recent cases reveals its basic incompatibility with Penry, and the need for this Court to provide additional guidance concerning the application of that decision.

A. Respondent's "Nexus" Theory Denies a Central Premise of This Court's Eighth Amendment Work

This Court has rejected the notion that a capital defendant's mitigating evidence must explain or excuse his offense in order to "attain[] constitutional mitigating value relevant to [his] culpability." Respondent's Brief at 9. This misconception, which undergirds the opinion of the Court below and upon which Respondent defends that decision, confuses "culpability" with "causation." Such a limitation on the evidence relevant to a jury's choice between life and death for a convicted defendant, particularly a seventeen-year-old defendant, would be utterly foreign to legal tradition and human experience. This Court has rightly refused to impose such limits.

For example, Boyde v. California, 494 U.S. 370 (1990) disproves Respondent's "nexus" thesis.[2] Boyde upheld the challenged California jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence -- in particular, evidence that was not linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] **allow for consideration of mitigating**

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2 Respondent's selective citation of footnotes, see Respondent's Brief at 10, should not distract this Court from the core of the holding in Boyde: the California statute was constitutional because it provided the jury what the former Texas statute did not: a vehicle for considering and giving full effect to **all** mitigating evidence, both crime-related and non-crime-related. Respondent's reliance on Boyde is misplaced.

> **evidence not associated with the crime itself**, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, **and youth.** When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Boyde, 494 U.S. at 383 (emphasis added).[3]

In the same manner, Justice O'Connor's remarks in South Carolina v. Gathers illustrate the Court's consistent definition of mitigating evidence, which countenances no "nexus" limitation:

> Our decisions in Lockett and Eddings were based on the proposition that the decision of the capital sentencer is a profoundly moral one. . . . Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so. . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

Gathers, 490 U.S. 805, 817 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting on other grounds) (emphasis added).

Finally, Payne v. Tennessee, ___U.S.___, 115 L.Ed.2d 720 (1991), compels the conclusion that Respondent's "nexus"

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[3] In Boyde, the petitioner had contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." 494 U.S. at 378. The Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected.

argument, and its wholesale adoption by the Court of Appeals below, are fundamentally out of line with this Court's Eighth Amendment cases. Payne upheld the State's presentation of so-called "victim impact" testimony, concerning the "specific harm" suffered by the victim of the crime and her survivors, in large part because "virtually no limits are placed on the relevant mitigating evidence a defendant may introduce concerning his own circumstances." Payne, 115 L.Ed.2d at 733. This Court emphasized that such mitigating evidence "must be received" and considered, even if none of the mitigating evidence is related to the circumstances of the crime. Id.; see also 115 L.Ed.2d at 735-736 (noting that evidence that defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite not being related to the offense).

A limitation on the mitigating significance of youth that constricts it to disproving "future dangerousness," as championed in the lower Court by Respondent, is fatally inconsistent with the principles of Lockett and its progeny. Respondent urges this Court to allow States to limit the kind and quantum of mitigating evidence that may be considered by a sentencer in reaching its decision whether a defendant will live or die. Specifically, Respondent wants to deny -- and concedes that the en banc majority opinion can be read to deny -- the jury the power to give youth any positive or affirmative significance in its decision. Such a principle, which admits of no meaningful

limitation, could transform the punishment phase into a truncated, pro forma inquiry, effectively abandoning the system of bifurcated trials which this Court has relied upon to ensure individualized sentencing in capital cases. The issuance of such a ground-breaking precedent alone is reason for this Court's plenary review.

B. The Court of Appeals' Majority Retreated from Penry

The narrow en banc majority below represents a substantial challenge to this Court's Eighth Amendment capital punishment jurisprudence. Fifth Circuit panels, in stated reliance on the Graham interpretation of Penry, have further narrowed the range of evidence and issues to be considered in mitigation at the punishment phase of a Texas capital trial.[4] These panels have further held that a potential mitigation issue is not Penry/Graham problematic unless it can be and is supported by

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4 See Lincecum v. Collins, ___ F.2d ___ (5th Cir. 1992) (evidence of mother's abandonment of defendant as a child, coupled with testimony regarding defendant's emotionally disturbed state at time of crime, not Penry problematic); Barnard v. Collins, ___ F.2d ___ (5th Cir. 1992) (evidence of severe head injuries only months before the crime, resulting in need for psychiatric help and loss of work; evidence of intoxication at the time of the offense; and evidence of a troubled childhood not Penry problematic); Cordova v. Collins ___ F.2d ___ (5th Cir. 1992) (evidence that defendant was "drinking heavily" at the time of the offense, drank frequently, and "act[ed] crazy" when drunk, "not the kind of uniquely severe permanent handicap" requiring additional jury instructions under Penry); Clark v. Collins, ___ F.2d ___, (5th Cir. 1992) (adopting district court opinion that evidence of alcoholism and remorse not problematic under Penry); Wilkerson v. Collins, ___ F.2d ___ (5th Cir. 1992) (evidence of youth [age 19] not problematic under Penry, citing Graham).

expert testimony.[5] All concede that expert testimony is often important and sometimes essential - in any phase of any criminal trial.[6] However, it turns law and reason on their heads to make the availability of such evidence, designed to "assist the trier of fact,"[7] into a precondition to jury consideration of an issue. A moment's reflection would show that such a rule could have seriously undesirable consequences in civil as well as criminal litigation. Moreover, at the level of constitutional analysis, such a precondition directly affronts the consistent course of this Court's Eighth Amendment teaching about the scope of mitigation evidence in capital cases. See Sec. II (A), supra.

These Fifth Circuit cases suggest that, in the absence of further guidance from this Court, Graham may well obliterate Penry. Perhaps more significantly, these cases show the Fifth Circuit continuing to narrow the scope of evidence a sentencing

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5 In Barnard, for example, although family members had testified to dramatic changes in temperament experienced by the defendant, in addition to describing the severe head injuries he suffered not long before the crime, the Court of Appeals discounted the evidence: "Barnard cannot rely on his mother's inexpert speculation concerning [his] mental condition to demonstrate a Penry-type disability." Barnard, ___ F.2d at ___ (slip op. at 9) (accord Lincecum, ___ F.2d at ___ ("inexpert opinion" testimony does not implicate Penry). Although this particular limitation does not originate in Graham, it well illustrates the reach of Graham's basic premise, and the threat posed by that premise to the regime of individualized sentencing introduced in Woodson, established in Lockett, and reaffirmed in Penry.

6 See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985) (due process requires defendant have access to expert assistance where defendant's sanity will likely be a significant issue at trial).

7 See Fed. R. Evid. 702.

jury must or may have when choosing between life and death. See Payne, 115 L.Ed.2d at 732 (noting that "an inquiry broad in scope, largely unlimited as to the kind of information [considered] or the source from which it may come," has traditionally been appropriate in criminal sentencing, especially in capital cases) (citations omitted).

The lower court also departed from this Court's established Eighth Amendment principles, and from Penry in particular, in adopting the diluted standard that the former Texas special issues are constitutional if they 'substantially' allow for the consideration of the 'principal mitigating thrust' of evidence. Graham, 950 F.2d at 1027. This assertion, by operation, would overrule this Court's explicit reservation that the Texas special issues are not constitutionally 'adequate' unless they function "in a way that ... clearly direct[s] the jury to consider fully ... mitigating evidence as it bears on [the defendant's] personal culpability," Penry, 492 U.S. at 322. See also Franklin v. Lynaugh 487 U.S. 164, 184 (O'Connor, J., concurring).

Finally, the Court of Appeals ignored Penry in determining that the mitigating value of evidence may be further limited by requiring it to function only in negation of the two former Texas special issues unless it had relevance "substantially" beyond their scope.[8] Respondent urges this Court to endorse this

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[8] While the Court of Appeals does not attempt to quantify its use of "substantially," it is instructive to note that none of the cases reviewed by that Court since Graham (see text, supra) has satisfied this test, despite the wide range of mitigating circumstances they have presented.

additional constriction of the mitigating value of evidence, arguing that the State may relegate all mitigating evidence to the narrow role of "rais[ing] a reasonable doubt as to the special issues." Brief in Opposition at 12. This proposition is precisely the one rejected in Penry. Penry recognizes that some mitigating evidence (there, evidence of child abuse and mental retardation) may not raise any reasonable doubt in relation to the former Texas special issue questions, yet may reasonably move a juror to conclude that a sentence less than death is warranted. The very flaw identified by this Court was the unconstitutional shoehorning of all mitigation into the role of negating the aggravating special issues. Respondent's attempt to harmonize the opinion of the en banc majority below with this Court's reasoning in Penry strikes a sour note.

C. Jury Discretion, Life and Death

At bottom, this case concerns what juries may be told, and must be told, at the sentencing phase of a capital trial. As Judge Higginbotham recognized in his dissent below, it is not possible -- even if it were desirable -- to eliminate jury discretion. Some of this Court's decisions have considered the limits imposed by the Eighth Amendment on jury discretion, as by limiting the offenses for which the death penalty may be imposed. See, e.g., Tison v. Arizona, 481 U.S. 137 (1987). Mr. Graham's case presents an equally important aspect of this Court's Eighth Amendment work: ensuring that the jury has sufficient latitude

to assess life rather than death when the evidence demands it, by spelling out the legal rules that govern jury discretion.

Mr. Graham's Petition shows the consensus among Justices of this Court on the core issue: the relevance of youth to the sentencing decision in a capital case. See Gregg v. Georgia, 428 U.S. 153, 197 (Stewart, J., joined by Powell and Stevens, JJ., announcing the opinion of the Court); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring); Stanford v. Kentucky, 492 U.S. 361, 375 (1989). Given that consensus, Respondent's Brief (like the narrow majority opinion it defends) fails to shoulder the burden of instructing a capital jury in such a manner that it may give effect to that evidence in imposing sentence. A convicted capital defendant is entitled not only to present evidence, but also to have the jury told what it may do with the evidence, and how. In Mr. Graham's case, the statutorily-mandated jury instructions affirmatively narrowed the jury's consideration of mitigating evidence that every member of this Court would acknowledge as relevant to sentence.

This Court has taught us that "jurors are well-equipped to analyze the evidence," Griffin v. United States, ___ U.S.___, 112 S.Ct. 466, 474 (1991). This observation reflects the fact that jurors in a capital case will be moved by the evidence for and against death, and will apply their wealth of human experience to understanding and assessing it. At the same time, however, this Court has cautioned that "when ... jurors have been left the option of relying upon a legally inadequate theory, there is no

reason to think that their own intelligence and expertise will save them from that error." Id. In precisely the same fashion, a juror in this case might well have concluded that Mr. Graham's youth could not be considered at all, much less that he could "weigh" Mr. Graham's youth against the evidence in aggravation and decide whether a death sentence were warranted. The resulting effect -- that a juror might feel compelled to vote "yes" to the special issues, resulting in a death verdict, despite the existence of facts calling for a lesser sentence, is the evil Penry was intended to correct. This Court should not ignore the fact, as Mr. Graham pointed out in his Petition, that Texas has recently repaired its capital sentencing statute to mend this precise flaw.[9] The majority of the court below, clinging to an incomplete understanding of an antiquated statute, repeats the errors of the past.

---

[9] The new Texas statute retains the "special issue" format, with one important difference: if the jury answers the "aggravating" special issues affirmatively, it must then answer

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's charcter and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Code Crim. Proc. Art. 37.071, § 2 (b) (1), § 2 (b) (2), § 2 (e) (Vernon's ed. 1992). The new statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." Id., § 2 (f) (4).

CONCLUSION

Judge Higginbotham and the other dissenters below accurately portray the sentencer's constitutional function and prerogative at the penalty phase of a bifurcated capital trial. What the Eighth Amendment requires is unlimited access to relevant sentencing information and a way for the jury to give that information meaningful effect in the form of an appropriate sentence. The narrow en banc misapprehends the quality of mitigating evidence and the jury's role at sentencing; its opinion will intolerably diminish accuracy and reliability in capital sentencing. Petitioner Gary Graham thus respectfully prays that this Court grant the writ to review the judgment of the en banc United States Court of Appeals for the Fifth Circuit in his case, and reverse his sentence of death.

Respectfully submitted,

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No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,

Petitioner,

V.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPTARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari was served on counsel for Respondent by placing same into the U.S. Mail, first-class postage prepaid, addressed to: Enforcement Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 21st day of May, 1992. I further certify that all parties required to be served have been served.

Michael E. Tigar
Member, Supreme Court Bar

May 21, 1992

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Dear Sir/Madam,

Enclosed for immediate filing please find enclosed one original and one copy of Mr. Graham's **Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.**

If you have any questions, please do not hesitate to call.

Sincerely,

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SUPREME COURT, U.S.
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No. 91-7580

In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Certiorari Granted June 8, 1992

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2-23-88		APPLICATION To PROCEED In FORMA PAUPERIS.
2-24-88	2	(DH) MEMORANDUM ON THE DENIAL OF A STAY OF EXECUTION AND WRIT OF HABEAS CORPUS, filed.
2-24-88	3	Pltf. NOTICE OF APPEAL to Order entered Feb 24, 1988, filed.
2-24-88	4	Pltf. APPLICATION for Certificate of Probable Cause to Authorize Appeal, For Leave to Appeal in Forma Pauperis and for Certification that Appeal is taken in good faith, filed.
2-24-88	5	(DH) ORDER DENYING STAY OF EXECUTION, WRIT OF HABEAS CORPUS, AND CERTIFICATE OF PROBABLE CAUSE FOR AN APPEAL, filed. 1. Pltf. Motion for stay of execution is DENIED. 2. Pltf. Application for a writ of habeaus [sic] corpus is DENIED. 3. Pltf. Motion for a certificate of probable cause is DENIED.
2-24-88	6	Copy of ORDER by Court of Appeals on 2-24-88 by rapicom GRANTING Stay of Execution until further notice, filed.

3-10-88	8	**RETURN OF STAY OF EXECUTION** issued to J. A. Lynaugh.
9-6-88	9	Certified Copy of ORDER by Court of Appeals DENYING Petition for Certificate of Probable Cause, filed.
10-6-88	10	Copy of ORDER by Court of Appeals on Oct 3, 1988, STAYING Execution until 6:00 p.m. October 31, 1988 to allow appellant to file a petition with U.S. Supreme Court, filed.
2-11-92	11	Certified copy of ORDER by the CCA GRANTING the motion of appellant to stay the issuance of mandate pending petition for writ of certiorari to and include 3-9-92, filed.

CAUSE NUMBER 335,378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT
	AUGUST TERM, A.D., 1981
	Oct. 28, 1981

MEMBERS OF THE JURY:

The defendant, GARY GRAHAM, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 13th day of May, 1981 in Harris County, Texas. To this charge the defendant has pleaded, "Not Guilty."

Our law provides that a person commits murder when he intentionally or knowingly causes the death of an individual.

A person commits capital murder when such person intentionally commits the murder in the course of committing or attempting to commit the offense of robbery.

A person commits a robbery if, in the course of committing theft, as defined hereinafter, and with intent to obtain or maintain control of the property, he

(a) intentionally, knowingly or recklessly causes bodily injury to another; or

(b) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

"Bodily injury" means physical pain, illness, or any impairment of physical condition, including death.

"Theft" as used herein is the unlawful appropriation of the corporeal personal property of another, with the intent to deprive such other person of said property.

"Appropriation" and "appropriate", as those terms are used herein, means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" as used herein means tangible or intangible personal property or documents, including money, that represents or embodies anything of value.

"Deprive" as used herein means to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception or coercion.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the person charged. "Possession" means actual care, custody, control or management of the property.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly or with knowledge with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly or with knowledge with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Before you would be warranted in convicting the defendant of capital murder, you must find from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was engaged in the commission or attempted commission of the felony offense of robbery of BOBBY GRANT LAMBERT, as defined in this charge, but also that during the commission of the robbery or attempted commission thereof, if any, the defendant shot BOBBY GRANT LAMBERT with the intention of thereby killing him. Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said BOBBY GRANT LAMBERT when he shot him, if he did shoot him, you cannot convict him of the offense of capital murder.

Now if you find from the evidence beyond a reasonable doubt that on or about the 13th day of May, 1981, in Harris County, Texas, the defendant, GARY GRAHAM, did intentionally kill BOBBY GRANT LAMBERT by shooting him with a gun and that said defendant was then and there in the course of committing or attempting to commit the offense of robbery of BOBBY GRANT LAMBERT of his property, then you will find the defendant guilty of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder.

A defendant in a criminal case is not bound by law to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case, and any juror doing so may be guilty of contempt of court. If any juror starts to mention the defendant's failure to testify in this case, then it is the duty of the other jurors to stop him at once.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony case. It is not evidence of guilt, nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

The fact that he has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial.

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you and these instructions, you will acquit him. You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Foreman or Forelady. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto and sign the same as Foreman or Forelady.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case you must not consider, discuss nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

You [sic] sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this case; and restrict your deliberations solely to the

issue of whether the defendant is guilty or not guilty of the offense charged in the indictment.

After you have retired you may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer, the attorneys, or the Court concerning any question you may have. After you have reached a unanimous verdict, the Foreman or Forelady will certify thereto by using the appropriate form attached to this charge and signing his or her name as Foreman or Forelady. After argument of counsel you may retire to consider your verdict.

/s/ J. Richard Trevathan
J. RICHARD TREVATHAN,
Judge Presiding
182nd District Court of
Harris County, Texas

We, the Jury, find the defendant, GARY GRAHAM, "Not Guilty."

_____
FOREMAN OR FORELADY
OF THE JURY

We, the Jury, find the defendant, GARY GRAHAM, "Guilty" of the offense of capital murder, as charged in the indictment.

/s/ Ben D. Bradley
FOREMAN OR FORELADY
OF THE JURY

CAUSE NUMBER 335378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT

MEMBERS OF THE JURY:

By your verdict returned in this case you have found the defendant guilty of the offense of capital murder, which was alleged to have been committed on or about the 13th day of May, 1981 in Harris County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues", in this charge. The Court instructs you further, however, as follows:

1.

The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

2.

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's

answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the jury's deliberation.

If ten (10) jurors or more vote "No" as to any Special Issue, then the answer of the Jury shall be "No" to that issue, and the Foreman will so record the Jury's answer by signing his name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "No", then there shall be no answer for that Special Issue and the Foreman should not sign his name to any answer form for that Special Issue.

3.

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the Answers to Special Issues hereby submitted to you.

A defendant in a criminal case is not bound by law to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case, and any juror doing so may be guilty of contempt of court. If any juror starts to mention the defendant's failure to testify in this case, then it is the duty of the other jurors to stop him at once.

Under the instructions herein given, it will not be proper for you, in determining the penalty to be assessed, to fix the same by lot, chance, or any system of averages, or any other method than by a full, fair and free exercise of the opinion of the individual jurors under the evidence submitted to you.

You are not to discuss among yourselves how long the defendant would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor and are not to be considered by you.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given their testimony, but you are bound to receive the law from the Court which has been given you and you are bound thereby.

/s/ J. Richard Trevathan
J. RICHARD TREVATHAN,
JUDGE PRESIDING
182ND DISTRICT COURT
HARRIS COUNTY, TEXAS

REQUEST OF THE JURORS

FILED: –

CAUSE NUMBER 335,378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict you will answer "YES" or "NO" as you find the fact to be.

ANSWER: Yes

/s/ Ben D. Bradley
FOREMAN OF THE JURY

REQUEST OF THE JURORS

FILED: –

CAUSE NUMBER 335,378

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
GARY GRAHAM	182ND JUDICIAL DISTRICT

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict you will answer "YES" or "NO" as you find the fact to be.

ANSWER: Yes

/s/ Ben D. Bradley
FOREMAN OF THE JURY

REQUEST OF THE JURORS

FILED: OCTOBER 30, 1981

CAUSE NUMBER 335,378

THE STATE OF TEXAS IN THE DISTRICT COURT OF

VS. HARRIS COUNTY, TEXAS

GARY GRAHAM 182ND JUDICIAL DISTRICT

SPECIAL ISSUE NO. 3

Do you find from the evidence beyond a reasonable doubt whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

In your verdict you will answer "YES" or "NO" as you find the fact to be.

ANSWER: Yes

/s/ Ben D. Bradley
FOREMAN OF THE JURY

0907/10

MINUTES OF THE 182nd DISTRICT COURT OF HARRIS COUNTY, TEXAS

AT THE August TERM, A. D. 1981

JUDGMENT

NO. 335378

THE STATE OF TEXAS

v.

Date October 26 1981

Kenneth Stokes aka Gary Graham on motion of the Defendant the Court ordered same charged to Gary Graham

Attorney for State: Asst. Dist. Atty. Carl Hobbs

Attorney for Defendant: Ron Mock and Chester Thornton

Offense CAPITAL MURDER Murder Murder and Aggravated Robbery as charged in four paragraphs of the indictment but upon motion of the State the 2nd 3rd and 4th paragraphs were abandoned and dismissed; the Defendant on trial for CAPITAL MURDER

Date of Offense: May 13 A.D. 1981

Plea: Not Guilty

Count and/or
Paragraph: count one paragraph on CAPITAL MURDER

Pled to Enhancement
Findings on Enhancement: n/a

Punishment: Death

The Defendant having been indicted in the above entitled and numbered cause for the felony offense indicated above and this cause being this day called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, and both parties announced ready for trial.

A jury composed of Ben D. Bradley and eleven others was selected, impanelled, and sworn. The indictment was read to the Jury and the Defendant, entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant and the argument of counsel, the Jury retired in charge of the proper officer and returned into open court on the 28th day of October , 1981 , the following verdict, which was received by the Court and is here entered or reco:d upon the minutes:

"We the Jury, find the defendant, GARY GRAHAM "Guilty" of the offense of capital murder, as charged in the indictment

/s/ Ben D. Bradley
FOREMAN OR FORELADY
OF THE JURY"

Thereupon, the jury, in accordance with law, heard further evidence, and having been again charged by the Court, the jury retired in charge of the proper officer and returned into open Court on the 30th day of October 1981 , the following verdict, which was received by the Court and is here entered of record upon the minutes:

CAUSE NO. 335378

THE STATE OF TEXAS VS. GARY GRAHAM	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 182nd JUDICIAL DISTRICT

SPECIAL ISSUE NO. 1

Do you fidn [sic] from the evidence beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict you will answer "Yes" or "No" as you find the fact to be

ANSWER: Yes
/s/ Ben D. Bradley
FOREMAN OF THE JURY

CAUSE NO. 335378

THE STATE OF TEXAS VS. GARY GRAHAM	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 182nd JUDICIAL DISTRICT

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict you will answer "Yes" or "No" as you find the fact to be

ANSWER: Yes
/s/ Ben D. Bradley
FOREMAN OF THE JURY

CAUSE NO. 335378

THE STATE OF TEXAS	IN THE DISTRICT
VS.	COURT OF HARRIS
GARY GRAHAM	COUNTY, TEXAS
	182nd JUDICIAL
	DISTRICT

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

In your verdict you will answer "Yes" or "No" as you find the fact to be

ANSWER: Yes
/s/ Ben D. Bradley
FOREMAN OF THE JURY"

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, as found by the verdict of the jury, and that the said Defendant commited the said offense on the date indicated above, and that he be punished, as has been determined by the Jury, by death, and that Defendant be remanded to Jail to await further orders of this court.

And thereupon, the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof.

Whereupon the Court proceeded, in presence of said Defendant to pronounce sentence against him as follows, to wit, "It is the order of the Court that the Defendant named above, who has been adjudged to be guilty of the offense indicated above and whose punishment has been assessed by the verdict of the jury and the judgment of the Court at Death, shall be delivered by the Sheriff of Harris County, Texas immediately to the Director of Corrections of the State of Texas, or any other person legally authorized to received such convicts, and said Defendant shall be confined in said Department of Corrections in accordance with the provisions of the law governing the Texas Department of Corrections until a date of execution of the said Defendant is imposed by this Court after receipt in this Court of mandate of affirmance by the Court of Criminal Appeals of the State of Texas.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence. From which sentence on appeal is taken as a matter of law to the Court of Criminal Appeals of the State of Texas, Austin, Texas.

Signed and entered on this the 30 day of October 1981 .

/s/ J. Richard Trevathan
Judge 182nd District Court
Harris County, Texas

COPY TO TDC 11-2-81

NO. 335378-A

EX PARTE	§	IN THE 182ND
	§	DISTRICT COURT
GARY GRAHAM,	§	
Applicant	§	OF
	§	HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT AND ORDER

Having considered the application for writ of habeas corpus and the Respondent's Answer in the above-numbered cause, the court makes the following findings of fact and conclusions of law base [sic] upon the documents filed in the above numbered cause and the official court records.

FINDINGS OF FACT

1. The Applicant, Gary Graham, was charged by indictment under cause number 335378 for the felony offense of capital murder.

2. Gary Graham was convicted in cause number 335378 for the offense of capital murder; after the jury affirmatively answered the special issues, the court assessed punishment at death by lethal injection.

3. Ronald G. Mock and Chester Thornton were appointed to represent Gary Graham in cause number 335378 on June 12, 1981.

4. Prior to trial, counsel reviewed the information in the State's file several times.

5. On numerous occasions prior to trial, counsel met with the applicant and attempted to discuss the facts of the case with him. The applicant stated only that

he did not commit the robbery-murder and that he had spent the evening with a girlfriend whose name, appearance, and address the applicant could not remember.

6. Although defense counsel made numerous inquiries of applicant, he did not give his defense counsel the names of any potential alibi witnesses, nor did the applicant tell his counsel where he had been and what he had been doing on the night of the instant offense, May 13, 1981.

7. No person ever presented himself to defense counsel as an alibi witness, either before, during or after trial.

8. Specifically, the applicant did not furnish his counsel with the names or addresses of Dorothy Shield, William Chambers, Mary Brown, or Lorain Johnson as potential alibi witnesses.

9. This court finds that the testimony of William Chambers, Mary Brown and Dinah Miller concerning Gary Graham's whereabouts on May 13, 1981 is not credible testimony.

10. Gary Graham was aware that an investigator was working with defense counsel in connection with the defense of his case.

11. Counsel for applicant hired an investigator, Merv West, who assisted them in investigating and interviewing possible defense witnesses.

12. Counsel for Applicant filed a motion for a sanity and competency evaluation which was granted by the judge.

13. On August 6, 1981, Dr. John Nottingham of the Harris County Psychiatric Hospital conducted a psychiatric examination of the applicant. He determined

that the applicant displayed no evidence of any mental disease or defect which would interfere with his ability to assist his attorney. On August 26, 1981, Dr. Jerome Brown conducted a competency evaluation of the applicant. He concluded that the applicant was competent to stand trial.

14. The applicant's trial counsel did not request a third psychiatric evaluation because: 1) the two doctors' evaluations were consistent with each other; 2) the two doctors' evaluations were consistent with counsel' [sic] perception of the applicant's mental ability and judge would not authorize more than the statutory maximum of $500 for expert fees in an appointed case; 4) the defense counsel did not believe that a third, fourth or fifth evaluation would produce any different results; and 5) the defense counsel did not wish to use psychiatric mitigation evidence at the punishment phase for fear that it would "open the door" for the prosecutor to call Drs. Brown and Nottingham to testify to their findings which were thought to be detrimental to the applicant.

15. After due consideration, trial counsel determined that a mistaken identification defense would be the applicant's best defensive strategy.

16. Trial counsel and their investigator interviewed at least ten potential mitigation witnesses. Only two, the applicant's stepfather and his grandmother, would agree to testify favorably for the applicant. They did so at trial.

17. Counsel did not introduce testimony concerning applicant's drug and alcohol abuse as counsel reasonably believed (1) that such evidence would not be perceived by the jury as mitigating evidence, and (2) that such evidence would provoke little, if any, sympathy for applicant.

18. Trial counsel, Ronald G. Mock, attended the same high school as the State's main eyewitness, Bernadine Skillern. He was not personally acquainted with her.

19. Ronald Mock requested and received a pretrial suppression of identification hearing. Both at this hearing and during trial, he attempted to impeach Mrs. Skillern's ability to perceive, recollect, and testify to the applicant's identification. He questioned her on the lighting, distance, degree of attention, direction, and positions of all pertinent people.

20. Mr. Mock's cross-examination of Mrs. Skillern was not affected by the fact that he had attended the same high school.

21. The defense counsel personally purchased clothing for the applicant to wear during trial; there is no evidence to show this was demeaning or inappropriate attire.

22. Lisa Blackburn, the rape and robbery victim at whose home the applicant was arrested, identified the applicant sitting in the courtroom because she had spent over five hours in his presence, not because of any clothing he was wearing.

23. Defense counsel informed applicant that he had a right to testify in his own behalf, but advised him not to do so.

24. The applicant did not tell his trial counsel that he wanted to testify at either the guilt/innocence or punishment phases of the trial.

25. Counsels' advice not to put the applicant on the witness stand at either stage was the result of well-reasoned trial strategy. The trial attorneys reasonably believed that the applicant could not testify to

the events of the evening of the offense. They reasonably believed that putting the applicant on the witness stand during the punishment phase would have been counterproductive as they believed that the applicant would not make a sympathetic witness for himself.

26. The ultimate decision of whether or not to testify rested with applicant himself.

27. Trial counsel did not object to the State's challenge for cause of veniremen Olin Buz Cannon, Jim Jurado, Daniel Catnevert, and John J. Maguire, Jr., because these jurors had unequivocally admitted that they could never assess the death penalty.

28. Defense counsel did not request a limiting instruction concerning extraneous offenses at the punishment phase of the trial because they reasonably believed that there is no such instruction under Texas law.

29. Defense counsel did not object at the time of trial to the constitutionality of the Texas capital murder statute on any of the bases articulated in ground for relief "C" of Applicant's habeas corpus application.

30. The trial counsel made a reasonable investigation of the extraneous offenses admitted into evidence during the punishment phase. Mr. Mock did not know that one of the aggravated robbery victims, Ernest Doakes, was pushed out of his car in front of counsel's home because this fact was not in the official police offense report and Mr. Doakes did not discuss the facts of this case with Mr. Mock prior to trial.

31. While the court has read the applicant's exhibits C, D, and E, these psychiatric evaluations were conducted in July of 1986, a full five years after the commission of the instant offense. Nonetheless, they do not establish that the applicant was then or is

now incompetent. Further, the court does not believe that they are, **ipso facto,** mitigation evidence.

32. There is no credible evidence from any source to show that applicant was not of sound mind at or near the time of the offense in May, 1981.

33. On August 25, 1987, Dr. Jerome Brown once more conducted a psychiatric evaluation of the applicant. Once more Dr. Brown found the applicant competent, both to participate in an evidentiary hearing and assist his attorney. On two occasions applicant refused to cooperate with Dr. Brown in interviews held for the purpose of evaluating applicant's present competency to be executed.

34. There is no credible evidence from any source to indicate that Applicant is not competent to be executed under the standard enunciated in **Ford v. Wainwright,** 106 S.Ct. 2595 (1986).

35. This court has carefully considered (1) all psychiatric materials submitted by both the applicant and the respondent, and (2) the applicant's demeanor and abilities as he testified at the evidentiary hearing held January 8, 1988. While the reports from Dr. Dorothy Otnow Lewis and Dr. Jonathon H. Pincus suggest that the applicant is mildly brain damaged, of low intelligence, and has experienced "bipolar mood disorders," there is nothing in their reports or evidence from any other source to indicate that the applicant is either insane or that he does not know the fact of his impending execution and the reason for it.

CONCLUSIONS OF LAW

1. Defense counsel rendered reasonably effective assistance to Gary Graham in the investigation and preparation of his trial. Trial counsels' actions were

reasonable, based upon information supplied them by the applicant at the time of representation. **Strickland v. Washington,** 104 S.Ct. 2052, 2066 (1984); **Duncan v. State,** 717 S.W.2d 345, 348 (Tex. Crim. App. 1986).

2. Defense counsel were not ineffective for failing to request a third psychological evaluation of the applicant since two doctors had already examined the applicant, reached similar conclusions, and declared him both competent and sane. **Beans v. Black,** 757 F.2d 933, 936 (8th Cir. 1985); **Jennings v. State,** 647 S.W.2d 18, 21 (Tex. App. – Houston [1st Dist] 1982, pet. ref'd). Trail counsel had independently determined that the Applicant was sane and competent; they, more than any other party or the court, were in a position to evaluate the mental capacity of his client. **United States ex rel. Mirelies v. Greer,** 736 F.2d 1160, 1165-66 (7th Cir. 1984).

3. Since Ronald G. Mock did not have any personal relationship with the State's eyewitness, Bernadine Skillern, there is no credible evidence to believe that he had any conflict-of-interest in representing his client. **Cuyler v. Sullivan,** 446 U.S. 335, 348 (1980) (a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance). Defense counsel was not ineffective for failing to inform the applicant that he had attended the same high school as the witness. **Strickland,** *supra,* at 2065.

4. Trial counsel were not ineffective for failing to call four potential alibi witnesses whose names and addresses had never been given to them by the applicant. Trial counsel were not expected to investigate or produce witnesses about whose existence the Applicant did not inform his attorneys. **Jones v. Smith,** 599 F.Supp. 1292, 1300 (S.D. Ala., 1984), *aff'd*

772 F.2d 668 (1985), *cert. den.* 106 S.Ct. 838 (1986); **Cannon v. State,** 668 S.W.2d 401, 403 (Tex. Crim. App. 1984).

5. Since there is no credible evidence to prove, by a preponderance of the evidence, that the applicant was tried in inappropriate attire, counsel was not ineffective in this respect. **Strickland,** *supra,* at 2067 (any deficiencies in counsel's representation must be proven to be prejudicial to the defense).

6. There is no credible evidence to prove, by a preponderance of the evidence, that the applicant was prevented from testifying on his own behalf; thus, counsel was not ineffective in this respect. **Strickland,** *supra,* at 2065. Further, the defense counsel's rationale for advising the applicant against testifying was a reasonably effective trial strategy. **Strickland,** *supra* at 2065 (presumption that challenged action "might" be considered sound trial strategy).

7. The defense counsel were not ineffective for failing to object to the State's challenge for cause of veniremen Olin Buz Cannon, Jim Jurado, Daniel Catnevert, and John J. Maguire, Jr. Since they all unequivocally voiced opposition to the death penalty, they were unqualified to serve on a capital murder trial. **Lockhart v. McCree,** 106 S.Ct. 1758, 1760 (1986); **Johnson v. McCotter,** 635 F.Supp. 685, 688 (E.D. Tex 1986) (exclusion of veniremen who indicated that their views on death penalty would substantially impair their ability to function as jurors in capital case was proper, so that trial counsel was not ineffective for failing to object to their dismissal), *stay granted,* 107 S.Ct. 1262 (1987); **Marquez v. State,** 725 S.W.2d 217, 241 (Tex. Crim. App. 1987).

8. The defense counsel were not ineffective for failing to request a limiting instruction regarding the evidence of extraneous offenses during the punishment

phase of the trial as there is no such limiting instruction recognized in the Texas capital sentencing proceeding. *See, e.g.*, **Jurek v. Texas,** 428 U.S. 262, 274 (1976) (Texas capital sentencing procedure "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a death sentence"); **Smith v. State,** 676 S.W.2d 379, 390 (Tex. Crim. App. 1984) (evidence of unadjudicated extraneous offenses admissible at penalty stage of capital murder trial); **Quinones v. State,** 592 S.W.2d 933, 947 (Tex. Crim. App. 1980), *cert. denied,* 449 U.S. 893 (1980).

9. Defense counsel were not ineffective for calling only two witnesses at the punishment phase of the trial since there was no evidence to prove more witnesses were known to the defense counsel and were available to testify on the applicant's behalf. **Strickland,** *supra,* at 2066 (trial counsel's actions based upon information supplied to him by the defendant at time of representation); **Jones v. Smith,** *supra,* at 1300; **Cannon,** *supra,* at 403; **Moore v. State,** 700 S.W.2d 193 (Tex. Crim. App. 1985) (defense counsel's failure to call witnesses at punishment stage of capital murder trial did not deny defendant effective assistance of counsel).

10. Defense counsel were not ineffective for failing to call Dorothy Shield, William Chambers, Mary Brown or Lorain Johnson, as there was no credible evidence to prove that the applicant had ever told his counsel about their existence as potential alibi witnesses or that counsel knew of their existence from some other source. **Strickland,** *supra* at 2066; **Mitchell v. Kemp,** 762 F.2d 886 (11th Cir. 1985), *reh'g denied,* 768 F.2d 1353 (1985). Although their affidavit recites that these witnesses heard the applicant tell them that

the applicant had told his defense counsel about the witnesses, the court does not credit this second-hand hearsay.

11. There is no evidence to prove that trial counsel failed to conduct a proper investigation into the facts and circumstances of the extraneous offenses admitted at the punishment phase. **Strickland,** *supra,* at 2060-61; **Ex Parte Carillo,** 687 S.W.2d 320, 324 (Tex. Crim. App. 1985); **Ex Parte Prior,** 540 S.W.2d 723 (Tex. Crim. App. 1976).

12. The evidence does not prove that the trial counsel provided ineffective assistance in failing to procure a third psychiatric examination. **Beans v. Black,** 757 S.W.2d F.2d 933, 936 (8th Cir. 1985); **Felder v. Estelle,** 588 F.Supp. 664, 671 (S.D. Texas 1984); **United States ex rel. Mirelies v. Greer,** supra.

13. The applicant's death sentence was not cruel and unusual punishment under the Eighth Amendment to the United States Constitution. There is no constitutional bar to the imposition of the death penalty upon one who was 17 years of age at the time he committed a capital murder. **Prejean v. Blackburn,** 743 F.2d 1091, 1098 (5th Cir. 1984); **Cannon v. State,** 691 S.W.2d 664, 678 (Tex. Crim. App. 1985); **Ferguson v. State,** 573 S.W.2d 516, 525 (Tex. Crim. App. 1978).

14. The applicant has failed in his burden of proving that the Texas death penalty statute is unconstitutional. He has offered no facts which would demonstrate that the Texas capital punishment system operates, either generally or as applied to him, in an arbitrary or capricious manner. **Kirkpatrick v. Blackburn,** 597 F.Supp. 1562, 1578 (E.D. La. 1984); **Ex Parte Maldonado,** 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

15. Further, Applicant is procedurally barred from attacking the Texas capital murder statute on the bases enunciated in ground for relief "C" of Applicant's writ of habeas corpus as defense counsel failed to object to the statute on any of those bases at the time of trial.

16. The Texas capital murder statute and sentencing scheme is constitutional. **Jurek v. Texas,** 428 U.S. 262 (1976). *See* **Lowenfield v. Phelps,** ___ U.S.L.W. ___ (U.S. January 18, 1988).

17. The applicant has failed to prove any facts that would demonstrate that challenges for cause under **Witherspoon** resulted in a systematic exclusion of blacks on his jury. **McCleskey v. Kemp,** *supra* at 1766-1767; **Ex Parte Maldonado,** *supra* at 116.

18. The applicant failed to raise any issue regarding the composition of the grand jury in a timely fashion. This complaint has been waived. **Francis v. Henderson,** 425 U.S. 536, 540-541 (1976); **Francis v. State,** 636 S.W.2d 591, 598-599 (Tex. App. – San Antonio 1982, no pet.).

19. The applicant's claim that the jury that convicted him was underrepresented by blacks and that the prosecutor systematically excluded blacks from the jury was not raised either at trial or on direct appeal. As a result, applicant is procedurally barred from raising that complaint at this time. Additionally, the rule in Batson is not available to a petitioner on habeas corpus review. **Allen v. Hardy,** 106 S.Ct. 2878, 2880-2881 (1986).

20. Further, the applicant has failed to establish a prima facie showing of discrimination in either the grand jury that indicted him or the petit jury that convicted him. **Batson v. Kentucky,** 106 S.Ct. 1712, 1722 (1986).

21. The applicant has not shown that the exclusion of all individuals under age 18 from the grand or petite [sic] jury has violated his right to a trial by an impartial jury drawn from a fair cross-section of the community. "Young adults" do not constitute a cognizable group; thus, their exclusion is constitutionally permissible. **Barber v. Pone,** 772 F.2d 982, 1000 (1st Cir. 1985).

22. The burden of proof in a habeas corpus proceeding is on the applicant. Applicant has wholly failed to meet his burden of proving that he is not competent to be executed.

23. The applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 335378-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of Applicant's pleadings in cause number 335378-A;

2. all of Respondent's pleadings in cause number 335378-A;

3. the Court's order;

4. the indictment, judgment and sentence in cause number 335378;

5. the affidavit of Mr. Ron Mock;

6. All psychiatric reports and exhibits filed in cause number 335378-A;

7. The transcript of the evidentiary hearing held January 8, 1988.

8. the entire appellate record in cause number 335378, the Statement of Facts and the transcript and the appellate opinion in cause number 335378;

9. the applicant's and respondent's proposed findings of fact and conclusions of law.

THE CLERK is further ORDERED to send a copy of this order to the Applicant.

Signed on this 9th day of February, 1988.

/s/ Donald D. Shipley
JUDGE PRESIDING

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illegible [SEAL]

EX PARTE
GARY GRAHAM

WRIT NO. 17,568-01

Application for a Writ of Habeas Corpus from HARRIS County

ORDER

This is an application for a writ of habeas corpus filed in this Court pursuant to Article 11.07, V.A.C.C.P. Applicant was convicted of the offense of capital murder and sentenced to death in cause number 335378 on October 30, 1981. On direct appeal the conviction was affirmed by this Court in an unpublished per curiam opinion. Graham v. State, No. 68,916 (delivered June 12, 1984). On July 13, 1987 applicant filed his Application for a Writ of Habeas Corpus in the trial court pursuant to Article 11.07, supra. The trial court, after conducting an evidentiary hearing on the application recommended that relief be denied and ordered the record transferred to this Court. The application along with an application for a stay of execution was duly received in this Court.

Today the applicant contends that he was denied the effective assistance of counsel at trial in several particulars. First, he claims that the attorneys failed to interview all of the witnesses including those whose names he had supplied them. Included in this latter group was four alibi witnesses who were never interviewed nor called to testify. At the evidentiary hearing this subject was covered in depth. Applicant testified that he gave these witnesses' names to the attorney but that they were not called. He also testified in conjunction with another allegation that he was not called as a witness at either phase of his trial by his attorneys even though he requested to

testify since his attorneys knew that he would inform the court of these witnesses and trial counsels' derelictions. Both attorneys denied that they were ever given any of these names other than those whose testimony they did investigate. According to the lawyers' testimony none of the witnesses that they or their investigator spoke with, with a few exceptions, wanted to testify. We find that the preponderance of the evidence adduced at the evidentiary hearing supports the trial court's findings that the attorneys fully investigated every witness of which they had knowledge.

Applicant also alleges that his attorneys were ineffective because they failed to obtain independent psychological and psychiatric examinations of the applicant which would have shown that applicant was of subnormal intelligence and was suffering from organic brain damage and dysfunction. The record reflects that applicant was examined at his request prior to trial on two occasions, both of which revealed that applicant was competent to stand trial and sane at the time of the offense. At the hearing both attorneys testified that they had no reason to believe that the results of those examinations were erroneous. In an abundance of caution the trial court had applicant examined as to his competency prior to the evidentiary hearing. No evidence of incompetency was found. We overrule applicant's contentions regarding his competency and sanity.

Applicant next contends that his lead counsel was personally acquainted with the state's key identification witness which caused him problems in conducting a searching cross-examination. At the hearing the attorney specifically denied that he knew the witness as alleged

and that his cross-examination was in any way affected. Applicant has not carried his burden of proof on this allegation and we overrule it.

Ineffective assistance of counsel is also alleged in that the attorneys allowed the applicant to be tried in the very same clothes in which he was arrested thus making identification easier. It must be pointed out that applicant was arrested in the home of a victim of a sexual assault he had just perpetrated. He had fallen asleep on her bed after committing the act at which time she called the police who affected the arrest. At the time of his arrest, applicant was not wearing clothing. It is hard to imagine that he was tried dressed in this fashion. However, applicant's attorney testified that he personally purchased the clothing that applicant wore at trial. Applicant testified that his mother had purchased the clothing he was wearing at trial. We find no support for applicant's assertion in the record of the evidentiary hearing and overrule the contention.

Applicant next alleges that the attorneys refused to allow him to take the witness stand at both the guilt or innocence and punishment phases of the trial. The attorneys, at the hearing, testified that they did strenuously advise applicant not to testify. They also denied applicant's assertion that he had requested to testify. We find no merit to this allegation.

Next applicant asserts that his attorneys failed to develop a "proper" trial strategy. Specifically he maintains that they erred in failing to object to the state's challenge for cause of four venirepersons. This was not developed at the hearing in any depth. However, one of

the attorneys testified that he felt that any objections to the particular venirepersons would have been frivolous. We find nothing within the record to indicate that their testimony was wrong and overrule this allegation.

Applicant further asserts that his counsels erroneously failed to request limiting instructions to the jury as to extraneous offenses introduced at the punishment phase of trial. We find no merit to this allegation.

Further applicant contends his attorneys were ineffective since they did not investigate the extraneous offenses that were admitted at the punishment phase of the trial. No allegation of what such an investigation would have shown is made at this time. In fact, at the evidentiary hearing applicant admitted that some of the extraneous offense, without specifying which ones, were crimes which he committed. There are insufficient factual pleadings to warrant relief. We do not find that applicant was afforded ineffective assistance of counsel at his trial.

In his next allegation applicant contends that he should not be executed since execution of one who committed capital murder when he was seventeen years of age is cruel and unusual punishment. In Ferguson v. State, 573 S.W.2d 516 (Tex. Cr. App. 1978) we held that youth alone would not prevent the imposition of the death penalty. See also Cannon v. State, 691 S.W.2d 664 (Tex. Cr. App. 1985). We overrule this contention.

Applicant next contends that the Texas death penalty statute is violative of due process for several reasons. First he alleges that the lack of a sentence review offends due process. However, the United States Supreme Court has held that such sentence review is not required of the

states. Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984). We agree. Next he contends that the charge did not contain language directing the jury in their consideration of aggravating and mitigating factors. We rejected this argument in Stewart v. State, 686 S.W.2d 118 (Tex. Cr. App. 1984) and will adhere to that decision.

In this same allegation applicant contends that trifurcation of the trial is required to allow consideration of mitigation and argument. We reject this contention as being without merit. Additional argument is not required. He also maintains that the jurors should be informed of, the results of their answers to the special issues. The record in this case reflects that they were in fact so informed. There is no merit.

Continuing the same allegation the applicant maintains that unadjudicated offenses should not be admissible at the punishment phase of a capital murder trial. In DeLuna v. State, 711 S.W.2d 44 (Tex. Cr. App. 1986), at 47, we wrote, "Proof of unadjudicated, extraneous offenses is admissible in the punishment phase of a capital murder trial, absent a showing that the defendant is unfairly surprised by such evidence." No such showing of surprise has been made in this case. There is no merit to this contention.

Lastly in this allegation applicant contends that exclusion of prospective jurors pursuant to Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) results in the exclusion of blacks in a discriminatory manner since a higher percentage of black people are opposed to the death penalty than those of other races. No support for this proposition is tendered and we find nothing upon which to grant relief. The contention is therefore overruled.

Applicant also contends that he has been denied due process, equal protection and the right to be free from cruel and unusual punishment since the grand jury and petit jury contained an underrepresentation of black people. No proof of this underrepresentation was shown. We reject the allegation. He also contends that the state used their challenges for cause and their peremptories to strike all blacks and young people from the jury. Again, no support for this proposition can be found in the record and we decline to speculate.

Lastly applicant contends he is not competent to be executed for his crime. However, as pointed out above, applicant was examined immediately prior to the evidentiary hearing with no indication of incompetency being found. This allegation is overruled.

Finding no merit in any of the applicant's contentions before this Court, we deny his application for a writ of habeas corpus. Given our action of this date we also deny the application for a stay of execution.

IT IS SO ORDERED THIS THE 19TH DAY OF FEBRUARY, 1988.

PER CURIAM

En Banc

Clinton, J., would grant a stay of execution and further proceedings pending final disposition of Franklin v. Lynaugh by the Supreme Court of the United States.McCormick, White and Duncan, JJ., not participating.

Do Not Publish

NO. 335,378

THE STATE OF TEXAS	)	IN THE DISTRICT COURT OF
VS.	)	HARRIS COUNTY, TEXAS
GARY GRAHAM	)	182ND JUDICIAL DISTRICT

MOTION TO HOLD ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE UNCONSTITUTIONAL AND VOID

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant, GARY GRAHAM who by and through his undersigned counsel respectfully moves this Honorable Court to hold Article 37.071 of the Texas Code of Criminal Procedure unconstitutional and void on the grounds that said article, which sets forth the procedures for the imposition of the death penalty, is violative of the Defendant's rights to be free from "cruel and unusual punishment" and to be free from arbitrary and capricious punishment, guaranteed by the Eight [sic] and Fourteenth Amendments to the Constitution of the United States, and further that said Article 37.071 is so vague and indefinite as to deprive the Defendant of "Due Process of Law" and "fundamental Fairness" guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and as grounds therefor the Defendant would respectfully show unto this Honorable Court the following:

I.

That the Defendant has a federally secured right to be free from the imposition of "cruel and unusual

punishment" in violation of the Eight [sic] Amendment to the Constitution of the United States. The State has indicated it will seek to impose the penalty of death in the instant case which is just such a punishment.

II.

That the Defendant has a federally secured right to be free from punishment imposed arbitrarily and capriciously in violation of the "due process" clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. The special issues procedure set out in Article 37.071 allow total discretion to a jury to make unfavorable findings against a Defendant, and such findings may be based on any prejudices the jury may have, individually or as a whole.

III.

That Article 37.071 is so vague and indefinite as to be incapable of interpretation by reasonable men and is therefore facially void as violated the Defendant's right to "due process" of law and fundamental fairness" guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Such terms as "conduct. . . . committed deliberately", "resonable expectation", and "probability" can have no meaning for the average juror and consequently death could result fir [sic] the Defendant without any true or reasonable version of the process or fundamental fairness.

WHEREFORE, the Defendant, GARY GRAHAM, respectfully moves this Honorable Court to hold Article

37.071 void and unconstitutional on its face and as applied and for such further relief as this Honorable Court may deen [sic] just and proper.

Respectfully submitted,

ATTORNEY FOR DEFENDNAT [sic]

/s/ Ronald G. Mock
RONALD G. MOCK
609 Fannin, Suite 2129
Houston, Texas 77002
(713) 223-2660
S.B.O.T. #14242700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void has been delivered to Assistant District Attorney, Carl Hobbs, Harris County Courthouse, Houston, Texas, this 13th day of July, 1981.

/s/ Ronald G. Mock
Ronald G. Mock

ORDER

On this day the above Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void, having been presented to the Court the same is hereby (GRANTED) (DENIED).

/s/ Illegible
JUDGE PRESIDING

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NO. 335,378

THE STATE OF TEXAS) IN THE DISTRICT COURT OF
VS.) HARRIS COUNTY, TEXAS
GARY GRAHAM) 182ND JUDICIAL DISTRICT

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO HOLD ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE UNCONSTITUTIONAL AND VOID

TO THE HONORABLE JUDGE OF SAID COURT:

In *Furman v. Georgia* (1972) 92 S. Ct. 2726, the United States Supreme Court clearly de ineated [sic] the Eight [sic] Amendment guidelines relating to "cruel and unusual punishment" as they related ti [sic] the imposition of the penalty of death in a criminal proceeding.

> "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudice." *Furman v. Georgia, Supra*, at P. 2728."

Article 37.071 of the Texas Code of Criminal Procedure, which sets out the procedures by which the death penalty is to be imposed "gives room for the play" of just such prejudices. Article 37.071 leaves with both the judge and the jury a vas [sic] residue of discretion which is precisely what the Supreme Court in *Furman* condemned.

Article 37.071 proves in pertinent part that "(I)n the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence". Where are the stringent guidelines for the judge's discretion which would seem to be required by *Furman*? They are nowhere to be found in the language of Article 37.071.

While the special issue submission may to some extent insulate the jury from having to assess the punishment, the issues the jury must determine are vague, standardless, and confusing. Consequently, the inquiry is fraught with standardless discretion in the hands of the jury.

Article 37.071 (b) (1) inquires of the deliberate commission with the reasonable expectation of death, which (b) (3) inquires of the Defendant's provacation in killing the deceased. Can the State argue for a favorable finding as to (b)(1) where it has in its possession evidence favorable to the Defendant on (b)(3)?

Special issue number (b)(3) refers to whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. Is the propensity to commit such acts limited to the facts of the instant case, or is the State of Liberty to introduce extraneous evidence? And if so, what are the limitations on such evidence? Further, what is "probable commission" as opposed to possible or suggestive commission? Do the acts of violence have to be the same or similar to those for which the Defendant is on trial? How many extraneous acts of misconduct or offenses will the Court allow for proof of future conducts? How does one

measure future conduct or the propensity of any individual to commit future acts? Is the state of the psychiatic art such that we can make such predictions with any kind of reliability?

This ambiguity, this residue of discretion left by Article 37.071, is precisely what the Supreme Court in *Furman* sought to condemn.

> (W)e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied feeding prejudices against the accused if he is poor abd [sic] despised and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Furman v. Georgia, Supra,* at p. 2735.

GARY GRAHAM is an indigent, lacking the social or political clout or prestige of "those who by social position may be in a more protected position." Article 37.071 allows for the prejudices, biases and fears of the jury to selective feed against this accused. Accordingly, this Honorable Court should hold Article 37.071 of the Texas Code of Criminal Procedure unconstitutional and void.

Respectfully submitted,

/s/ Ronald G. Mock
Ronald G. Mock
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Houston, Texas 77002
(713) 223-2660
S.B.O.T. #14242700

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Memorandum in Support of Defendant's Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void has been hand delivered to the Assistant District Attorney, Carl Hobbs, Harris County Courthouse, Houston, Texas, this the 13th day of July, 1981.

/s/ Ronald G. Mock
Ronald G. Mock

In The District Court Of Harris County, Texas,
182nd District

(Caption Omitted In Printing)

[p. 28] MS. CAROLYN VONGONTEM ALTMAN, called as a prospective juror, having first been duly sworn, testified as follows:

THE COURT: Are both sides ready?

MR. HOBBS: We're ready.

MR. MOCK: The Defense is ready.

QUESTIONS BY THE COURT

Q Ms. Altman, this is the Courtroom I normally am in, and I feel more comfortable talking to you here. Is there anything before I get into the individual questioning, is there anything I discussed in the general comments to the jury that presented any problems to you as far as your understanding was concerned? Do you understand the principles that I talked about with regard to the presumption of innocence and the burden of proof and the purpose of the indictment, the right of the Defense to remain silent and not present any testimony; the function of the different participants in the trial, any of that that presented any problems to you?

A No.

Q Do you understand my discussions with you with regard to the fact that this is a capital murder [p. 29] case, and the fact that if you are to serve as a juror on this case, there is a possibility that you would have to consider the possibility of the death penalty in this case, do

you understand that is a fact and question that has to be answered?

A Yes.

Q Let me explain to you, Ms. Altman, the way in which you would consider this. As I stated here, in Texas we have a two stage system. In a capital murder case, if the jury returns a guilty verdict on the guilt or innocence phase of the trial, that we talked about, we then move to the punishment phase. As I told you previously, there are only two alternatives that the jury would have. You're past guilty or not guilty. You have already decided that the defendant is guilty of capital murder. You then enter the punishment phase, and the jury has only two alternatives. They can say, "We recommend life in the Texas Department of Corrections," or, "We recommend death or capital punishment." Now, the jury does not just return a verdict form saying, "We recommend death as a punishment for capital punishment." What the jury [p. 30] does is answer two special issues. In some situations there are three. If you do serve as a juror in this case, and you get to the punishment phase of the trial, and the jury has found the defendant guilty of capital murder, you will have to consider at least two special issues, and those special issues are, take a look at the bulletin board up here and I would ask you if you would to [sic] look at special issue one and two on the board up here. The first special issue, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the deceased or the death of another person would occur. That is the first special issue. So obviously, the first issue you, as a juror, would have to consider is whether or not

the actions that the State will attempt to prove to you with regard to Mr. Graham's alleged killing the complainant in this case, Mr. Bobby Grant Lambert, whether or not the act that caused the death of Mr. Lambert was committed deliberately and done with a reasonable expectation that Mr. Lambert's death or another would occur. So that is the first [p. 31] special issue that the jury would answer. Obviously you answer that either yes or no. Now, if the jury –

A I understand the deliberately [sic]. What was the last part of that?

Q With a reasonable expectation that the death of the deceased or another person would occur.

A Okay.

Q So really, I guess you would have to say there are two portions to that special issue, and in this situation would it be did Mr. Graham deliberately shoot Mr. Lambert with a pistol and number one, did he do it deliberately and number two, when he shot him, did he do it with a reasonable expectation that Mr. Lambert would be killed or that another person would be killed. So that is the first issue the jury has to answer. If they answer the issue yes, they then move to the second special issue, and this is more or less, will cause you to be a soothsayer to look in your crystal ball and decide something with regard to the defendant. Whether there is a probability, it doesn't say a possibility, it doesn't say a certainty, is says whether there is a probability that the defendant will commit [p. 32] criminal acts of violence that would constitute a continuing threat to society. So obviously, what you have to look at would be the facts on the guilt or

innocence of the trial with regard to a particular charge against him, and if there was any other testimony that the Court deemed proper for you to hear with regard to either the defendant's criminal background, if we had any with regard to any other criminal offenses the defendant may have committed, if he did commit any other offenses, it would be at that time that that testimony would be proper for you to consider on how to answer special issue number two. And once again, the jury will answer special issues number one and two either yes or no. Now, this is the way our system works. If the jury answers special issue number one yes that the act that caused the death of Mr. Lambert was committed deliberately and with a reasonable expectation that he would be killed, if you answer that question yes or that special issue yes, and move to the second special issue and you felt there was sufficient evidence to show you that the defendant would commit a criminal act of violence and that special issue [p. 33] would be answered yes. If in that instance and only in that instance would the death penalty be the punishment. In other words, this is not a shell game where there is anything that is going to be hidden from the jury's mind. If you serve as a juror you would know through the entire proceeding, know if you answered both of the special issues one and two yes, I would have no discretion. The Judge has to assess the punishment at death for capital punishment. Okay. If the jury were to answer special issue one or two no, then I would assess life as a mandatory punishment. Two yes call for the death and one or two no answers call for life in the penitentiary. Does any of that present any

problems to you? Do you understand what I am talking about?

A Yes, I do.

Q The question I must ask you and the one that I talked to you about before is, and I have to frame it this way because the way I also embodied this question, Ms. Altman, do you have conscientious, religious or moral scruples against the infliction of death as a punishment for a crime in a proper case? We are talking [p. 34] about three areas. Do you have any conscientious, religious or moral scruples against the infliction of death as punishment in a proper case, that is not to say that it is the proper punishment in all capital murder cases or any other type of case. Once again, we can't go into the facts of this case. You have to conjure up a situation in your mind. Could you consider that as a punishment in a proper case?

A Yes, I could.

Q So, what you are telling me, then, you have no conscientious, religious or moral scruples that would prohibit you from voting for answering, answering those special issue questions, if you felt it was the proper punishment, is that what you are telling me?

A Yes.

Q Is there anything I have gone over up to this point that, Ma'am, that is uncertain in your mind before I turn you over to the lawyers for their examination?

A I don't think so.

THE COURT: Mr. Hobbs, will you proceed?

[p. 35] EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Good afternoon, Ms. Altman. My name is Carl Hobbs, and I am Chief Prosecutor in this Court. And this is Mr. Armondo Orte, an intern in our Court, and he will be helping, and Ms. Poppy Northcutt. They are students and possibly there will be two other Prosecutors, Mr. Mike Addudel, whom you have not met as of yet and Mr. Joe Magliolo. Now, as the Judge has told you, this is a capital murder case where upon a conviction for capital murder that the only sentence that is possible is either life or death, and the Judge has gone over that with you. Now, during this phase of the trial, as the Judge told you, there are no right or wrong answers. Each side has to represent their particular client and has to ask questions in order to exercise their peremptory challenges, in order to see if you would be a fair and impartial juror for both sides. So, there are no right or wrong answers, and please be frank and honest with us and tell us how you feel about it, because that is the best way for each of us. We wouldn't want you sitting on this jury trying to make a decision [p. 36] that you couldn't do. Well, the first phase of the trial, as the Judge has told you, he broke it down into two phases. The first phase is guilt or innocence. During that phase of the trial, the State must prove beyond a reasonable doubt the elements of the offense. As the Judge told you, there is no definition of it. No legal definition for what reasonable doubt is or is not. It is just good common sense. I can tell you a few things it is not. It is not proof beyond all doubt or beyond a shadow of a doubt, as you may have heard on television. I think you will agree with me if it was beyond all doubt you

would have to be present at a particular instance to see it, yourself, before all doubt would be removed, and if you were in fact in that position, you would be a witness and not a juror. Do you have any problem with that concept?

A No, I don't believe so.

Q Okay, now, conflict, conflict can exist between say, the people in this room. If someone came running through that door right now and threw something across the room and then ran out the door there. Okay, and then everyone was asked [p. 37] to describe that person. Okay. All the people in this room, I doubt very seriously, and I think you would agree with me, that most of the people here would give different descriptions or have seen different things at a given time, depending on where they were and their opportunity to observe the defendant at a given time. Would you agree?

A Yes, I would.

Q So, there would be conflict at some time. Conflict, in and of itself, I offer you this proposition is not reasonable doubt. Would you agree with that?

A Sir, would you repeat that?

Q Conflict in and of itself is not reasonable doubt. Conflict as to the descriptions as the example I gave you of the person coming in, depending on where that person was.

A Okay.

Q Now, your job as a juror is to look at the witnesses, judge their demeanor, their motives, and to make, to accept what they say, all of what they say as being the

truth fully, part of what they say or absolutely nothing. You judge the credibility of the witnesses. That is your job [p. 38] as a juror. Now, when we are coming back into – and to determine what the facts are, you are going to hear, and there might be conflict. Conflict, in and of itself, is the juror's job to determine that conflict. Do you understand that?

A Yes.

Q There might be different stories as to what happened. It is the jury's job to determine what has happened so conflict in and of itself is not necessarily reasonable doubt, but the jurors must resolve conflict, do you understand that?

A Yes, I do.

Q The burden of proof is upon the State, but that is beyond a reasonable doubt. Beyond a reasonable doubt as to what the elements of the offense are. That and only that. We don't have to prove what color fifty cars were coming down the North Freeway at a given hour as part of the case or what witness number five was wearing that evening. It's the question that the law allows. And what are those elements. They are the elements that are set out in the indictment. Now, for purposes of where we are going here, I have got a little [p. 39] chart, and if this is too far, can you read these?

A Oh, yes.

Q The first thing the State must prove beyond a reasonable doubt is that it was the defendant, Kenneth Stokes or Gary Graham, alias Gary Graham. Alias Kenneth Stokes, that it was him that committed the offense,

beyond a reasonable doubt; that it occurred in Harris County, Texas; and that it was on or about May 13, 1981. On or about that date. It doesn't have to be – it could be a few days before or within the statutes of limitations. Does that present any problems?

A No, it doesn't.

Q Then we go on to several other elements here. Whether the defendant did then and there unlawfully while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, the complainant in this case. Now, in the course of committing or attempting to commit, now it will read that way, but in the charge you will be instructed by the Judge or either one of the two. Okay. Any problem with that thus far?

A No.

Q Now, we go on to the rest of the elements. Now, these are the things we are talking about as [p. 40] proof beyond a reasonable doubt. That and only that. That he intentionally caused the death of Bobby Grant Lambert. It was an intentional act, not an accident, not any defensive theory, but an intentional act. Okay?

A Okay.

Q By shooting Bobby Grant Lambert with a gun, as the last element. Okay?

A Okay.

Q Now, those are the things that the State must prove to you beyond a reasonable doubt. Those and only those. Do you have any problems with that?

A No, I don't.

Q You can see that would eliminate what type of clothes the witness was wearing or how many police officers or whatever –

MR. MOCK: I object. That is one of the purposes of the jury and only for the jury to determine whether or not that conflict is enough to raise reasonable doubt.

THE COURT: That is sustained.

Q Now, in the course of committing theft. We are going to be talking about this. What is capital murder? Capital murder consists of murder plus [p. 41] as the Judge told you some other felony offense. So when we are talking about that, and murder can be in a shorthand rendition, it's the voluntary killing of another human being without excuse or legal justification. That is a shorthand rendition of what murder might be. Then we will have something else. In the course of committing or attempting to commit robbery. As we have in the elements, now we come into the course of committing theft, as the definition for robbery, that means conduct which occurs in an attempt to commit, during the commission of or in the immediate flight after the commission of the theft. So either in an attempt, if I came up to the Court Reporter here and pulled a gun and demanded her purse and never got it before I shot her and ran, that would still be aggravated robbery, and then if my shot killed her, capital murder. Or I could go demand the purse, take the purse, then shoot. Capital murder. Or demand the purse, take the purse, move back and then shoot her. Okay?

A Okay.

Q Or afterwards. Do you have any problems with that?

[p. 42] A No, I don't.

Q So, in an attempt where no money, nothing, no property had to be taken at all, then it still can result in the offense having been committed. Do you have any problem with that?

A No, I don't.

Q Okay. Now, you realize when the Judge was going over the rights of the defendant, he was talking about certain things, presumption of innocence. That presumption of innocence is in fact there until the State proves the case beyond a reasonable doubt as to each and every one of those elements. Now, the State can't call the defendant to the stand. You realize that?

A Yes, I do.

Q And he doesn't have to take the stand. If he doesn't take the stand, you will be instructed that you cannot consider that for any purposes. Do you understand that?

A Yes, I do.

Q If he should testify, and he does not have to and the law says he doesn't have to, then you should judge his credibility as you would any other witness. Do you have any problem with that?

[p. 43] A No.

Q Okay. I mean what I am saying is you wouldn't look at him any different or give him some special rights that you wouldn't give another witness or less rights than another witness?

A Well, my hesitation was if he didn't testify there was nothing to judge, I had nothing to base an opinion on.

Q Okay, now, as part of that right both the State and the Defense have the same rights to call or not to call witnesses. Okay, it's the State's burden to prove the case beyond a reasonable doubt. They don't have to prove anything. They can sit there and not ask one question, okay?

A Okay.

Q And that – but they have the same powers to call or not to call or to call witnesses if they desire to. That goes for both sides. Do you understand that, Ma'am?

A Yes, I do.

Q Now, when we are talking about in the concept of robbery and what we have talked about, the elements of the offense, do you have any problems with that?

A No.

[p. 44] Q Okay. Now, and we have talked about in the course of and no problem there and committing theft, which means it can be before, during or after?

A Yes.

Q No property has to be taken before robbery can occur?

A Okay.

Q Looking at the issue of whether or not capital punishment should go, as the Judge has told you, in the first instance now when we are talking about intentional, that will be defined for you, the word intentionally caused the death.

A Okay.

Q That is an element of the offense, and it is defined as a person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. So that is an intentional act. The State must prove to you that murder, the killing was an intentional act by the defendant before you can find the defendant guilty of capital murder, okay?

A Okay.

[p. 45] Q Any problem with that?

A No.

Q Now, one of the aspects to – this is an important consideration. The law says and allows, and if you believe, you, as a juror, judge the credibility of the witness and determine the facts, the Judge rules on the law, what you have is, if you believe beyond a reasonable doubt and I'm going to give you a hypothetical, that the State presents a single witness, okay, who testifies and testimony is evidence for consideration by the jury. Okay, from the witness stand, as sworn testimony, if you believe that person beyond a reasonable doubt, and the State has proved each and every element beyond a reasonable doubt as the law requires, could you, if you believe that

beyond a reasonable doubt, base a conviction upon the testimony of a single witness?

A I would say yes.

Q Okay, you hesitated a little bit.

A I haven't been asked these questions before. I haven't thought about them.

Q But that doesn't pose a problem if you believe that person beyond a reasonable doubt?

[p. 46] A That is correct.

Q Okay, now, so we are looking at – then we are going into the other aspect. We are in the first phase of the trial, and the first phase of the trial is whether or not the State has met its burden as to each and every element. Now, is there any reason in your mind, Ma'am, why you would tend, if you believed the State had proved each and every element as the law requires, of their case in the guilt stage of that, of the trial, would there be any reason, for any religious, conscientious or moral reason why you would not follow the law if you believed beyond a reasonable doubt each of these things and find the defendant guilty, knowing that upon a finding of guilt, guilty of capital murder, that there are only two punishments, life or death? Would that fact, knowing that as the Judge has told you, would that preclude you from following what you believed to be true and following the law and the instructions of the Court?

A No, it wouldn't.

Q Now, we are going into the second phase now. Where we are going to be looking at two issues, at the

punishment phase of the trial. Now, during [p. 47] this phase of the trial, the law allows you to use the testimony and the evidence that was presented at the first phase of the trial in answering your questions as to the second phase of it, okay?

A Okay.

Q It also allows other evidence to be brought to you if any evidence as to prior criminal record, acts of violence, other reputation testimony that would help you in answering the questions to the special issues that the Judge has gone over with you. Do you have any problems with that?

A No.

Q Okay, so when we are looking at special issue number one, whether or not the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would occur, okay, I'm going to leave out of another. Now, when answering that question, the Judge is not going to define deliberately for you. It won't be defined in the law. Deliberately doesn't mean premeditation. Webster's Dictionary defines it as willful or voluntary. It doesn't [p. 48] mean accidently. [sic] Okay. So, do you have trouble with the word deliberately?

A No, I don't.

Q And looking at the facts of the case, now you are going to have to suppose with me, now, you have heard the facts in the first phase of the trial, and having believed those beyond a reasonable doubt and the State

had met its burden, you found that the defendant has been guilty of capital murder. Okay?

A Okay.

Q Murder in the course of an aggravated robbery or robbery. So you have some action, and you are going to have found intentional. Intent in and of itself does not mean deliberately. Okay, but what I am saying is that you can take the entire consequences of that, plus whatever evidence may be brought to you during that phase to answer question number one. Do you have any problems with that?

A No.

Q And with the word deliberately?

A No problem.

Q Okay, as an example, if I came back and I held the gun and I was waiving a gun around here and [p. 49] I trip against the wall and it fell and hit her and shot and killed the Court Reporter, the actions probably wouldn't be deliberate unless by my actions, or if I came back up and just walked up and pulled it, walked up and shot her. By testimony that may come out during the course of a trial that would aid you in answering the question, do you have any problems with that?

MR. MOCK: Excuse me, at this time for the sake of clarity for the record and myself, I wanted to make sure which one Mr. Hobbs indicated would be deliberately. I think he said when he came around the corner and stumbled and dropped the gun and hit her and he mentioned another hypothetical on that may have also been deliberately – for my own information.

THE COURT: I think Mr. Hobbs was indicating a situation where you pull the gun deliberately and walk up and point it at the individual, that is a deliberate act. The other was accidental.

QUESTIONS CONTINUING BY MR. HOBBS:

Q And the act could still be deliberate at some range in between those two, would you not agree?

A Yes.

[p. 50] Q Okay, now, when we go into special issue number two, most likely, the most special issue that could be answered by the jury, or three, the three that are listed here. Most likely just two, but we are going to look at all three, but primarily concentrate on the first two.

MR. MOCK: Your Honor, I make an objection. The Court will determine whether the third issue is raised by the evidence, and I would request that the venireperson be voir dired on all three issues because in our examination it will be raised by the information.

THE COURT: It is a certainty if we do reach the punishment phase of the trial you will have to consider special issue one and two. The jury would only consider special issue number three with response to provocation on the defendant's actions only if it's raised by the evidence during the trial. So it's a certainty you would consider the first two. It is uncertain at this time by virtue of the fact that neither I or you are familiar with the facts that number three is proper, but it is necessary that we instruct you as to three in the event it becomes proper. You may proceed.

[p. 51] Q The second special issue whether is a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society. Now, probability will not be defined. It doesn't mean absolutely. It is probable, or more than likely. Okay?

A Okay

Q The word is open for definition. Once again, by the actions and by the – could you base your verdict in the punishment stage upon the evidence that you heard during the first phase of the trial? What I am saying is that the actions of the defendant whose conduct during that period of time from the time that you heard, could you consider that in answering special issue number two?

A I don't understand the question.

Q In issue number one, the point of deliberately, okay, and in number two is there enough evidence provided at that point?

A It can or cannot.

Q Yes, Ma'am. What I am saying is that you are going to be asked whether there is a probability that the defendant would commit criminal acts of violence. Now, criminal acts of violence [p. 52] wouldn't be defined. That can be anything from an assault, if I go up and just touch him, that is a criminal act of violence and an assault. Come back and hit him, cut him, shoot him, rob him, these are criminal acts of violence. I walk up and tore off the rail around the Judge's Bench, that is an act of violence to property. It can be to property. Okay?

A Okay.

Q So, in testimony both from the first phase of the trial and also the testimony that could come in as to the defendant's reputation, and prior conduct, or what may be presented during that phase of the trial. Do you have any problems with that, Ma'am?

A I feel as if I would need more evidence, more questions or whatever about prior history of the person. I could not, I don't think I could base the decision totally on the evidence in phase number one.

Q Not knowing what that is?

A Not knowing what happens, what the evidence is in number one, I think it would be difficult for me to decide on punishment.

Q Okay, but would desirable testimony as to [p. 53] reputation and acts at or near the time of the occurrence of this, that would help you?

A Yes.

Q Now, probability doesn't give you any problem?

A No.

Q It doesn't mean for certain or absolutely, but more than likely, okay?

A Yes.

Q As to special issue number three, if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation by the deceased. Now, that is only if the person that was killed by the act of the defendant caused that act in some way by some provocation or unreasonable, but

you are asked was the defendant's response, what he did in causing that death unreasonable to the provocation if there was any. If there was some act, okay, now once again, that is not defined. But using your good common sense, now from the standpoint, do you have any problems with that concept?

A No.

Q Okay. Now, from anything we have discussed thus far, do you have any questions or any [p. 54] problems with anything, Ma'am?

A No.

Q Okay, now, as the Judge told you, if you voted yes as to special issue number one and yes as to special issue number two, because there is going to be a minimum of two special issues, if there are three, then yes to all three, that the defendant's conduct was unreasonable, so you are going to get yes answers to the special issues whether it be two or three will result in a death sentence for the defendant. Knowing that, that death would result if the jury unanimously agreed on yes answers as to the special issues presented, would that fact, you as an individual juror, cause you to disregard the testimony, even though you had believed that beyond a reasonable doubt, and that is the burden here, also the burden in on the State to prove the special issues. Once again, it is our burden, not the Defense, our burden, it hasn't switched, and it never will. That the act was deliberate, proved beyond a reasonable doubt, and you believed that hypothetically, you believed that was true, and you further believed that special issue number two is and was answered in the [p. 55] affirmative as yes, that he would

probably commit future acts of criminal violence, would there be any reason, knowing that death would result, that would cause you to not to vote yes, even though you believed yes to be the proper verdict and proper answers as to each of those special issues?

A Never having been in this situation, I don't think it would, but depending upon the evidence.

Q What I am saying, if it is based upon the evidence, but what I am saying, I'm giving you a hypothetical, I am saying you believed that, you believe that the State has, in fact, beyond a reasonable doubt, proved to you with evidence that the answers should be as to one and two, yes, okay, my question to you is if you believed that and taking that as a given fact, would there be any reason that only you can know that would cause you to say, "I will not do it, even though I believe it should be answered yes because I know death is going to result."

A No.

THE COURT: Anything further, Mr. Hobbs?

MR. HOBBS: No, Your Honor.

Q You have never, the crime you were a victim of [p. 56] about six years ago, is there any reason that would cause any problems?

A That was a crime of my brother's, not mine.

MR. MOCK: Pardon me?

A The crime was to my brother, not to me. I think the question was to me or any relative.

MR. HOBBS: Thank you. The State passes the witness.

THE COURT: Mr. Mock?

EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court, Ms. Altman, I, too, would like to thank you for your participation in our criminal justice system. And in a way of introduction, some of the questions I ask may be a little personal, but please believe me, we are not trying to delve into your private life, and none of the answers that you give are going to be the wrong answers. What we are trying to do, certainly from the State's standpoint and from the Defense's standpoint, is find twelve impartial persons that can listen to the evidence and make a decision one way or the other. So, some of the questions may seem [p. 57] personal, and we appreciate, also, your filling out the form and this helps a lot in asking questions. Gary Graham is charged with the offense of capital murder. Is there anything about that word, the wording that it's capital murder, meaning, as the State has outlined there are various ways to commit capital murder, and the State has to prove each element of that offense. Is there anything about the offense, itself, that you might find so repugnant that you could not listen as a fair and impartial juror to determine whether the defendant is guilty or not guilty of that particular type of offense?

A I don't think so, no.

Q Now, as you have also been told, the burden of proof is on the State. We don't have to do anything. As Mr. Graham sits here with me, he is presumed to be innocent until proven guilty beyond a reasonable doubt. Is there anything that would make you, at this point, not be able to give him that presumption?

A No.

Q Is there any reason you might think that he must have done something or he would not be here, the [p. 58] State of Texas with all its resources, would not have brought him to trial if they were not sure he had done something?

A What was the first part of that question?

Q Is there any reason for you to think that he wouldn't be here if he had not done something, he must be guilty of doing something, or the State wouldn't be –

A No, I do not believe that.

Q Ma'am?

A I do not believe that because he is here that he has committed a crime.

Q We have also told you that because of the State's burden and along with the order of the trial when the State rests, we can rest. We don't have to do anything. We can sit here and listen to the testimony and when they stop, we stop. It's all over. That is all you have to consider. And you have also been instructed that you cannot hold it as a circumstance against the defendant. Do you have any problem with that?

A You are saying if the defendant, himself, does not testify?

Q Yes, Ma'am.

A No.

[p. 59] Q You don't have any problem with going to the jury room and not even mentioning it, alluding to it or even holding it as a circumstance against him, whether there would be a question as to why didn't he tell us his side of the story if he wasn't guilty, if he hadn't done anything, why can't he tell us he didn't do anything? Do you understand the question?

A Yes, I understand.

Q Could you go back in the jury room without going through those gyrations and not holding it as a circumstance against the defendant that he did not testify against himself, testify at all?

A I thing I can. You want a definite yes or no, I suppose?

Q Yes, Ma'am.

A I would say that I would not hold it against him. I would not hold it against him.

Q Now, earlier, when you were talking, you indicated something to the effect that if he did not testify you would have nothing from which to base an opinion. Could you explain to me, Ma'am what you meant by that, please?

A No.

Q If you can remember?

[p. 60] A This is in the second phase, after the guilt, if guilt has been decided.

Q That is for you to answer. I was just listening to your exchange with Mr. Hobbs. You indicated that it could be that part?

A The part that I was trying to discuss if after guilt has been established and you get to the punishment phase, if there is no desirable facts or evidence brought up as to prior history, I think I would have a difficult time with sentencing death.

Q Okay, now, do you also understand, Ma'am, that as a juror that has been chosen to serve on this case, that you would not assess the death penalty?

A What now?

Q You would not, your own self, assess the death penalty. Your job as a juror would be to answer special issues that would be presented to you by the Court. If all of you unanimously answered all of the special issues yes, that would be special issue number one, number two and if raised by the evidence, number three, that the Court would automatically be mandated by its office to assess punishment at death. That you would not, on your own, be assessing the death [p. 61] penalty. You would just be answering special issues based on the evidence raised within the Courtroom?

A I understand that now.

Q Okay, now, you indicated – well, let me move on and I will get back to that. One other thing, we are also

here talking about punishment. So the first part of the trial as you have been told, is the guilt or innocence stage. The second part, if we get there, is the punishment stage. Now, unlike most criminal trials in the State of Texas were a defendant can choose who he wants to assess punishment if he is found guilty, because of the nature of the charge of capital murder, the code of criminal procedure mandates that the jury in this case assess his punishment. So we are not hopefully getting ahead of ourselves, as far as we are concerned in talking about punishment. Toward that end, would you have any feeling, Ma'am, that because we are talking about punishment at this stage, because we are mandated to do so by the code of criminal procedure, because we are mandated to talk about it now, we must discuss it with you now, have you any feelings in your mind that he [p. 62] must be guilty or we would not be looking ahead to talk about punishment, because we are mandated to?

A No.

Q Now, if we get that far on punishment, we will be talking about the special issues. If raised by the evidence the third special issue. The first issue determines whether or not the conduct of the defendant that caused the death was committed deliberately. The word deliberately to me has special definitions. How do you, Ma'am, in your own mind, define the word, deliberately?

A Intentional.

Q Do you have any problems with differentiating between the word deliberate, and as opposed to – I'm sorry, strike that. Do you have any problems with the word deliberately and deliberate as being one of a

thought out process where you sit down and determine that the result of your act will be to kill somebody?

A I use the word premeditated to that.

Q So you have no problems between the word premeditated and deliberate?

A No, I don't.

[p. 63] Q And you don't see them as synonymous?

A No, I don't.

Q Okay. You discussed deliberately previously when you were talking about Mr. Hobbs' example where he came around the corner and dropped the gun and it discharged, thereby killing the Court Reporter. He also gave you another example of coming around and walking up to her and shooting her. Then you said you could differentiate between the deliberate or intentional act of killing her and the other act, which may seem accidental in nature or something, and you also said you could understand it being deliberate being somewhere in between. Do you remember that?

A Yes.

Q What do you mean by being somewhere in between, and you can give us an example, if you would like, because none of us are talking about the facts of this case. We are talking about – unless you are chosen as a juror, we wouldn't know any of the facts of the case. The things we are talking about are circumstances that might happen. Hypotheticals. You can feel free to give me one, too. That is what this is called, and that is why we have an exchange and this is [p. 64] the only time we will get

to talk back and forth, and I will probably ask questions that will have you talking with me.

A The first question, the first thought that comes to my mind about deliberately, if a person is carrying a gun, is he intending on using it or what is the purpose of carrying it. Just because he has a gun in his pocket, does not mean to me that he is premeditating an act. If the one case where he had the gun and came to the corner and to me, that was accidental. He may have had it out for some other purposes, but the actual killing of this person was accidental, even if he had wanted to be intentionally shooting someone or going to shoot someone else. Could you lead me to the rest of it now at that point in time clear?

Q You indicated that somewhere in between you might still find the crime to be deliberate, somewhere between the accident and the intentional you still might find it to be deliberate, and I'm trying to find where that point is, if you have not – I'm not trying to elicit something that you don't know. If you have established in your mind somewhere where that point might be [p. 65] it's all right.

A Offhand, I cannot think of an example to back that up. I think generally that I'm sure there is an in between ground somewhere and depending on the evidence, I would have to decide at that point.

Q You would wait until you heard the evidence before you made that decision?

A I think the evidence would prove to me what that decision would be.

Q Fine. That is all we would ask. Also, in these cases, the State is not required to show you any type of motive or why the killing took place. Would you automatically assume that the killing was deliberate if he didn't know why it happened?

MR. HOBBS: Objection, Your Honor. It calls for a conclusion on the part of the witness that the State must prove motive and I object to that.

MR. MOCK: That was not my statement. I said the State does not have to prove motive. They only have to show the elements of the offense as outlined here, but my question was if they did not prove motive, which goes to punishment and punishment alone, whether or not she would [p. 66] be able to automatically answer yes to the question of deliberate because she didn't know why.

THE COURT: If you understand that question, Ma'am, you can answer it. I don't understand the objection nor the statement.

A I'm having trouble understanding the statement. I don't have to give a yes or no to that.

Q (By Mr. Mock) No, you don't.

A I don't understand the question.

THE COURT: Well –

Q Well, do you understand that the State doesn't have to show you why a person was killed, do you understand that?

A Yes.

Q Okay, they only have to prove to you the eight elements Mr. Hobbs placed on the board and indicated to you that that was the elements of the offense. They have to prove each and every one of those, each and every one singularly. They can't prove the four out of seven or five out of eight and you give them credit for the rest of that. Do you understand that?

A Yes, I do.

Q Part of that is and a lot of it comes from [p. 67] television or t.v., I imagine, but there is an underlying factor that there is also a motive for something being done. Somebody always wants to know a motive, there is a reason for something being done. Do you understand that they don't have to show you a reason or a motive for any – for the killing, itself? They don't have to show you why it was done?

A Okay.

Q Do you understand that?

A I accept that.

Q Yes, Ma'am?

A Yes.

Q And you can still, return a verdict of guilty if you so believed by the evidence that each and every element of the offense without being shown why you think it was done?

A Yes.

Q You still could return a verdict of guilt?

A Yes.

Q The point I am alluding to is once we get to – if we get to the punishment phase of the trial, would the fact that you didn't know why it happened, you determined that it happened, that it was done by some certain person, would the fact [p. 68] that you might not at that stage of the trial know why it happened, effect your deliberations in answering the questions?

MR. HOBBS: objection, Your Honor. That once again, implies that the State must prove motive in the punishment stage, although Counsel's question precludes that during the guilt stage, and I object on those grounds.

THE COURT: That is overruled. Let me see if I can explain this a little bit.

A All right.

THE COURT: The State doesn't have to prove to you why a crime is done. Obviously, there are some killings that take place with no motive whatsoever, just someone bent on doing a crime of violence. Mr. Mock is asking you if the State does not prove to you what the motive is would that in any way affect your deliberations on the punishment phase of the trial when you are trying to determine if the act was committed deliberately, and once again, if you can't answer the question, say, "I can't answer the question," and I think that is what Mr. Mock is driving at.

[p. 69] QUESTIONS CONTINUING BY MR. MOCK:

Q I'm not trying to confuse you.

A You understand this is my first time being questioned like this at all?

Q Yes, Ma'am.

A A lot of these questions I have never considered at all. The way I understand the question you are asking is that in the punishment phase if we get that far and motive has not been brought up or first established at the first phase of it, would that affect my deliberations in phase two?

Q Yes.

A I would answer that no, it would not affect me.

Q That is basically all I was asking. Thank you. As to special issue number two, I would like to ask you if you were chosen as a juror to hear this case, what kind of information would you like to have brought to you to assist you in determining the answer to special issue number two?

A Prior history.

Q Well, could you be a little more specific as to what do you mean by prior history?

A If there are any other criminal acts.

[p. 70] Q Now, the Court and the Prosecutor have also told you that they can bring you evidence of prior criminal acts. They can also bring you acts of violence at or near the time of this criminal offense, and then the other, reputation testimony, about the defendant from the community in which he resides, toward that evidence. Is there anything special that would assist you, not necessarily that you require us to bring, that would assist you

in making up your mind as to whether the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

A In my opinion, what you talk about the probability that a continuing threat, in my opinion, a first offense of guilt does not make me believe that it always happens or that it would happen again. What I'm trying to say is that I, in my dealing with other people as a supervisor, have always given the person more than one chance to make a mistake, but if it is repeated, action is required.

Q That is fair. Would the fact, would the fact that a person has committed another criminal act of violence automatically make you vote yes to [p. 71] issue number two?

A Not automatically, but it would be a consideration.

Q Well, assuming that it has been shown that the person has committed other criminal acts of violence, what else would you like to have to assist you in making the determination as to issue number two?

A Other instances, what he has done for the community could be brought up, but a person, in my opinion, a person's beliefs, that he is emotionally convicted to his outwardly expressions in his actions, so even though a religious background was brought up, if that person is still committing acts of crime, then I feel like he would not be serious about his other emotional convictions. Does that answer your question?

Q Very well. Thank you. Moving on to question number three, and this is the one we are going to probably spend the most time on because it raises some issues that for me, as a defense lawyer, who does this everyday, to understand. Okay?

A Okay.

Q And that is if raised by the evidence whether the conduct of the defendant in killing the deceased [p. 72] was unreasonable in response to the provocation, if any, by the deceased. Now, what this may seem to you is a civil defense issue, that because the deceased acted in a certain way, thereby, provoking the person to kill him, that what the person did may have been to protect himself or may have been in self-defense. Do you understand, Ma'am, that in a capital murder where you are alleging another criminal offense that the issue of self-defense is not available to a defendant?

A I had not heard that.

Q Well, it is not available to a defendant.

A Okay.

Q So, what we are talking about here is not saying that I acted in self-defense or acted to protect myself, which in cases of murder or some other offenses charged, do you understand our penal statute is justification for the act of one, is not available in this instance to the defendant or any defendant charged with capital murder. What we are talking about here, however, is some act done by the deceased and the deceased person, which causes the defendant to act in one way in response to that provocation, the end [p. 73] result being the death of the

deceased. Are you with me, because I might have lost myself? I was trying to think and talk.

A I'm following your thought. Is there a question behind this or is this a statement?

Q I'm going – I'm heading you to where I'm going to ask you a question, but I want to make sure you have an understanding of the basic law as it relates to the third issue.

A As I understand it, you are saying that if in the process of the crime the deceased person provocated the defendant some way which caused him to shoot.

Q To react, and that reaction thereby is the cause of the death of the deceased.

A Okay.

Q Let me give you a couple of examples maybe that will clear up something. Can you understand the situation where a person goes into a, somewhere where he has no place to be, with a gun, walking up to a person and saying, "I want your money," and then shooting him straight away? Another instance might be where you walk into somewhere where you have a perfect right to be and it's at or around the time where there are other [p. 74] people who could be there. The person walks in with a gun and says, "Give me your money." Well, in response to that question of giving me your money, looking down the barrel of a gun, the deceased person then makes a move for his own gun and raises his gun in an attempt to fire at the robber. The robber is then shot and killed. Can you differentiate between the two examples that I gave you?

A You said the robber is shot and killed.

Q No, I'm sorry. The person that was at his place of business was then killed because he pulled a gun as the robber was asking him for the money.

A Yes, I see the difference.

Q You can see the difference between the two?

A Yes.

Q What does provocation mean to you?

A Causing a person to react.

Q And what might it mean to you in the context of this special issue number three that you may have to answer?

A What was the question again?

Q What does provocation mean to you within the context of issue number three and the way it is construed?

[p. 75] A The way I'm interpreting this, the first thing I think of is when the deceased, if the deceased was trying to protect himself or angry words or exclaiming of some sort.

Q Well?

A I'm blind right now.

Q I can understand that. Feel free to tell us.

A I'm blind right now.

Q This is a matter of exchange for us to chat and see how you feel about certain things. That is all. It doesn't

have to square off with either one of us. It's a matter of how you feel. That is what is important. Let me ask you thin, Ma'am. Have you developed in your mind any concrete feelings about the death penalty in this assessment in our society?

A I personally do not like the idea of making a decision to send someone for the death sentence. The recourse I do have now this is because of my own Christian convictions, I would not like the idea of thinking well everything at that point, it would be beyond a doubt that he would be guilty because of connecting evidence any wrong decision, a wrong decision could possibly be made somewhere. Twelve people are only human. [p. 76] Knowing that if a guilty sentence is issued and the death sentence is also decided upon that in my mind, I think that the case would be referred to a higher Court. I may be wrong, but that would ease my conscience that I have killed someone myself by making a decision.

Q. Well, have you had the feelings about the death penalty for a long time or have they been recently formed or have you even considered it?

A When I was in college I wrote a term paper on capital punishment, but I don't remember that much about it anymore. Up until today when I was told I had to make a decision, I had not made a decision which way I would go. The only thing that has happened me making a decision is speaking before today, long before I knew that I was going to have jury duty, speaking with the person that was on a capital murder case that I know I didn't understand how she could do it and she said once you get the evidence and you are sure there is no problem in

her own mind of making her mind, of the punishment phase.

Q One way or the other?

A Yes.

Q You talked to somebody else and got their feelings, [p. 77] but could you voice your own emotions, because you know that although you are not sentencing a person to death, you know that it is mandatory by the code of criminal procedure, but the end result is going to be the same. Could you divorce your emotions and vote according to the evidence, knowing that, knowing what the end result of your verdict would be if you answered yes to all three special issues?

A I cannot answer that with a strict yes or no.

Q I would like for you to explain, Ma'am.

A I would have to say I think I could. I would only know my emotional reaction after I had done that. Just make that decision. I do not know how I would act after I made that decision, but I feel as though the evidence, if the evidence is that clear to me that it is guilty, then I should not have a doubt in my mind about it.

Q One minute, please. Does the fact that you would not be the person assessing punishment at death if you came to that conclusion, but that it would be because it is mandated by the code of criminal procedure, the Court would have to do it, would that in any way ease your apprehension about the assessment of the death penalty?

[p. 78] A And may I add one comment?

Q Yes, Ma'am.

A The only other thing that would help me assess the death penalty is when I was talking about needing extra evidence or facts about prior history. If there was – where multiple offenses were, I would not want to live in the community with that person, and I would have to take some action to protect myself.

Q Well, Ma'am, in assessing any type of punishment in these types of cases, it takes twelve unanimous jurors to answer yes to special issue number one, two, and if it's raised by the evidence, number three, in order for a death penalty to be assessed. It takes a number of ten jurors voting in one way, voting no in order for the life penalty to be assessed. If you had heard the evidence and made a decision in your own mind, based on the evidence that you heard, could you hold out, Ma'am, for what you believed, with the resources and full deliberations which is within the province of the jury, but through other than through that deliberation process, could you, after you made up your mind, hold out for what you believed in [p. 79] against twelve people or eleven people that might not be for what you believe, one way or the other, after you made the decision, could you stick with your decision?

A Yes, I can.

Q And one kind of last question, Ma'am. Was – are you of the frame of mind now that if you were on trial for capital murder that you would like to have a person of your own convictions at this point to sit on your jury?

A Yes, I would.

THE COURT: Anything further, Mr. Mock?

MR. MOCK: Just one minute, Your Honor. Just one more question, Your Honor.

Q Ms. Altman, is there any reason whatsoever, and again, like we told you there are no right or wrong answers, this is the only time we will have a chance to talk to you, is there any reason whatsoever that you can think of in your own mind or your own conscience that you could not be a fair and impartial juror, listen to the facts of this case and make your decision after the evidence is in, one way or the other, any reason whatsoever that you can think of that I might not have touched upon, now will be the only [p. 80] time you will have a chance to tell us if there is?

A Being that I have never been in a legal atmosphere before, the only thing I have seen is what is on t. v. and I know that is very different, but knowing that even like on t. v. things I have been able to make a decision on that, I would hope the evidence in whatever case if I ever get picked would be relatively clear to me where there wouldn't be many tough decisions to make. I would hope the evidence would be quite clear.

Q Yes Ma'am, but can you think of any reason you can think of in your own mind that you could not be fair and impartial?

A I don't think there is.

Q Where you couldn't listen to the facts?

A I know of no reason why I couldn't listen.

THE COURT: What says the State?

MR. HOBBS: The State would accept.

MR. MOCK: You can give her a date to come back, Judge.

THE COURT: Will you stand and be sworn by the Clerk of this Court?

(At this time juror sworn by the Clerk)

[p. 81] THE COURT: Ms. Altman, we anticipate it will take approximately two weeks to complete selection of the jury. We have your home phone number and your business phone number. If for any reason you should change either phone number or your place of work within the next two weeks, if you will contact the Bailiff or the Clerk in this Court and let us know of the change. Once we begin testimony, we expect one week for the trial. It should be completed in three weeks. You are excused at this time to go to your home or place of work or whatever, and we will be contacting you in advance to let you know when the trial is going to begin.

JUROR: Will someone give me a list of names or phone numbers or can I get that from someone?

THE COURT: I will ask Mr. Pollinger to give that to you. Thank you, Ms. Altman.

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[p. 281] MR. RAYBURN M. HOOVER, JR., called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q. Mr. Hoover, it's been a little over a day since we spoke to you yesterday. However, I want to review some of the things I spoke about yesterday to make sure that what I spoke about did not confuse you and you understood what we talked about, and then it will become necessary to cover some things that we didn't speak about yesterday.

You will recall from my speaking with you yesterday as a group that I discussed certain constitutional principles that apply to the trial of every criminal case. You recall I spoke about the fact that the defendant in every criminal case is presumed innocent until he is proven guilty. You further recall that I spoke with you about the fact that the State has the burden of proof in all criminal cases, and that is to prove every element of the offense alleged in the indictment beyond a reasonable doubt.

[p. 282] You further recall that I spoke with you about the fact that the mere fact that the defendant is present in the courtroom or that an indictment has been returned against him is no evidence of guilt whatsoever. That in applying the presumption of innocence, it stays with the defendant throughout the trial and that you should infer no inference of guilt by virtue of the fact that Mr. Graham is present in the courtroom, that any charge has been

filed against him. You should not have the attitude that he must have done something wrong or he wouldn't be here. Do you understand that, sir?

A. Yes, sir.

Q. We further spoke about the fact that any accused in a criminal case has the right to remain silent and that the jury cannot infer any guilt from the fact that the accused does not testify against himself and it goes one step beyond and says that is also applicable if the defense presents no testimony at all. If the defense chooses to rest behind the State, you should not have the mental attitude [p. 283] of saying you need to hear both sides of the story before you make a decision because that is the constitutional safeguard against the defendant having any burden to present any testimony at all. I take it you can follow that principle of law, sir?

A. Yes, sir.

Q. You also recall that I spoke with you about the order of trial in a criminal case in Texas being what we call a bifurcated trial system. We have the guilt or innocence phase of the trial and we have the punishment phase of the trial. I know from looking at your juror information form you stated that you served on a criminal jury in a burglary case in 1971. So you are familiar with the two-step trial system?

A. Yes, sir.

Q. Obviously, the reason for the individual questioning in this case is because the import of the situation as I talked about yesterday, and the fact that should you serve as a juror in this case and return a guilty verdict,

should you return a guilty verdict individually and collectively as a member of [p. 284] the jury, you would then have to reach a decision with regard to what punishment should be assessed in this case. As I told you yesterday, in a criminal case involving a capital murder situation, the jury only has two alternatives for punishment. Those alternatives are life in prison in the Texas Department of Corrections or death by lethal injection. Those are the only two alternatives that the Court has or that the jury has. I will also go on to say that I, as the Judge, will not hand a slip of paper to the twelve members of the jury and say, is your punishment life or death. That is not the way it is done.

In a capital murder case, the jury instructs the Court as to what punishment the Court is to assess by way of special issues. Those special issues are tacked to the board behind you. Special issues number one and two are in the punishment phase of every capital murder case that reaches the punishment stage of the trial. Special issue number three is appropriate only if it is raised by the evidence, but there will come a time should [p. 285] you serve as a juror in this case, in which you will have to answer individually and collectively as a jury special issue number one and special issue number two, and it is the way in which the jury answers those special issues that determines what the punishment should be. The first special issue really effectively causes you to reflect back on the testimony that you have heard in the guilt or innocence stage of the trial because you have to reflect upon the testimony that you heard dealing with the conduct of the defendant in which you have decided that he is guilty for causing the death of another person, you

have to decide whether the act he committed in causing the death of that person was committed deliberately and with reasonable expectation that the death of the person he killed would occur. Special issue number one, in my mind, there are two key phrases. The word deliberately and the phrase reasonable expectation of death incurring. The word deliberately, unlike certain words or phrases that will be defined in the Court's charge in [p. 286] the guilt or innocence phase of the trial, there will be no definition as to what deliberately means in the Court's charge. That is something you will have to use your own common sense and define. Some people consider deliberately to mean an intentional act or someone's conscious objective to do that act. Possibly a voluntary act on that person's part or a willful act. All of those are synonyms. It is how you personally define deliberately in your common sense deliberation. The second phrase, reasonable expectation that the death of the deceased would occur, in considering the defendant's conduct, do you, as a juror believe beyond a reasonable doubt that the defendant reasonably expected to cause that – he reasonably expected to cause the death of the deceased in the case. I think if I give you two examples, it might make this a little more clear. Consider a situation in which a person goes into a drugstore with a pistol and goes in to rob a store, walks up to a store clerk, takes the money from the store clerk. The clerk gives the robber the money. The clerk [p. 287] does nothing in any way to provoke any difficulty with the robber. The robber just takes two steps back and pulls the trigger and shoots and kills the clerk. Obviously, you would probably have not much difficulty in determining number one in killing the clerk, the robber

acted deliberately and number two, in shooting the clerk of the clerk would occur. You probably wouldn't have much difficulty in that situation. On the contrary, you might consider a consideration where the same robber goes into the store, fully intending to go to commit robbery, but to not kill anybody, and when he walked in the store he trips over a basket, falls and the gun slips out of his hand and the gun hits the floor and accidentally goes off and hits the clerk. You might have a different result when you determine whether or not in causing the death of the clerk it was done deliberately and that he reasonably expected that the clerk would be killed, that death would result. You see there are differing fact situations, but those are pertinent in [p. 288] regard to special issue number one. Special issue number two more or less calls upon the jury to be clairvoyant, to look into the crystal ball and in effect to predict the future, because in special issue number two, the jury has to make a decision whether or not there is a probability that the defendant will commit criminal acts of violence in the future that will constitute a continuing threat to society. Obviously there are many things that you can look at in reaching this decision. You can look at the act, itself, in this particular capital murder case. You can look at that fact situation and say it is such a heinous fact situation that just based on the mere facts alone, you would say that person would be a continuing threat to society. You may not. Obviously, there are other types of evidence that the State could present to you. The State could show you a past criminal record and show you the commission of other offenses that the defendant may have committed. It can

present reputation testimony by other person in the community saying the defendant was nct a [p. 289] peaceful and law abiding person. These are things you can consider. Obviously, we are looking for persons who can go not only into the guilt or innocence phase but in the punishment phase of the trial with an open mind and to not be predisposed as to how they are going to vote one way or the other, and to only vote their conscience after the evidence is completely presented. The State has the same burden of proof on the punishment phase of the trial that it does on the guilt or innocence phase of the trial. The State must prove to you beyond a reasonable doubt, beyond a doubt based on reason, that the answers to special issues number one and two should be yes. If the jury unanimously returns a yes answer to each special issue number one and number two, I, as the presiding Judge, in this particular case, or any presiding Judge in any capital murder case has no discretion but to assess punishment at death. I do not have the power or the authority to change the jury's verdict. If the jury answers both questions yes, I cannot say in spite of your verdict I assess punishment [p. 290] at life. On the contrary, if the jury returns a no answer, one or two no answers, I do not have the authority to say I think that the man or woman should get the death penalty and assess the death penalty. The jury, their verdict is not done in a shroud of secrecy. The jury, by its verdict or by its answers to the special issues will know in advance the full import of their answers because I have no authority to change it. Two yes answers mean the death penalty. One no and one yes or two noes mean life in the Texas Department of Corrections. A yes answer requires a unanimous verdict

by all members of the jury. No answers require ten or more and no answers does not require a unanimous verdict. Ten or more is required for a verdict. Do you have any questions?

A. No, sir.

Q. It is obvious that the most pertinent point we are dealing with, the most important thing we can talk to you about is your feelings in regard to the death penalty. Our law requires that I ask you specifically or in a certain format your feelings about the death penalty, [p. 291] and I can vary somewhat in my discussions. My initial question to you is: Do you have a conscientious, religious or moral scruple against the imposition of the death penalty as punishment in a case that you consider for it to be proper?

A. No, sir.

Q. I take it, then, you are telling me that in a situation where you had found a defendant guilty by evidence beyond a reasonable doubt and in the punishment phase of the trial you were presented evidence that convinced you that the answers to special issue number one and two should be yes, that knowing full well what the impact of your answers are, you would still answer those questions yes?

A. Yes, sir.

Q. You have no religious, conscientious or moral scruples against the imposition of the death penalty in a proper case?

A. No, sir.

Q. Okay, now, as I have stated, in every capital murder case, a jury will be faced, on the punishment phase of the trial, if they get to it and only if they get to it with deliberations [p. 292] on special issues one and two, and you can see there is a third special issue tacked to the board, and as stated by the first phrase if raised by the evidence, sometimes special issue number three is submitted. Sometimes it is not. It is only submitted if it is raised by the evidence. And it goes on to say whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. And that requires a little explanation. Obviously, what we are dealing with here is a capital murder case. We are dealing with the situation where an accused in a capital murder case has provoked the difficulty. He has started the confrontation by, for instance, in the example that I gave you, that the robber, walking into the drug store with a gun, walking in with a gun, that person has provoked the difficulty. If the store clerk were to pull a pistol from under the counter and fire at the robber, the robber cannot, in turn, claim self defense and say he – his life was in jeopardy, and he had to kill the store clerk. Special issue number [p. 293] three is more in line of mitigation and not in the line of self defense, but what the import of special issue number three is presented is whether the conduct of the person who was killed in any way provoked or created more provocation in a situation in that the defendant, in shooting the deceased, embarked upon something, in shooting the deceased, was his conduct reasonable or unreasonable, based on the provocation that that store clerk had added to the situation. I realize it is a very fine line, and it may be difficult to

understand, but let me see if I can give a couple of more examples. You may view differently when you are faced with the situation of assessing life in the penitentiary or death by lethal injection. The situation where the robber walks into the store, takes the money from a store clerk, and as he turns to leave, not intending to hurt anyone, the store clerk fires and shoots him in the arm or leg, and he turns and shoots and kills him, you may view that situation differently than you would a cold blooded killing where the store clerk is helpless with nothing in his [p. 294] hand and the robber kills him out of spite. You may view those situations differently. That is not to say our law excuses or in any way allows that in mitigation with regard to the fact that he is guilty or not guilty of capital murder. The – it only is added for the jury's consideration as to whether or not they will assess punishment at life or death. So, if the jury finds that the conduct of the defendant, in killing the dead person, was unreasonable in response to any provocation by the deceased, if he provoked the situation at all.

Going back to the situation where the man is standing there with nothing in his hand and he is killed, obviously, there is no provocation. Therefore you would probably find that the defendant's conduct was unreasonable and you would answer special issue number three yes. On the other hand, you might find that it was not unreasonable where he had been shot twice by the store clerk and was trying to get out of the store. You may or may not. That is in your discretion as a juror. Do you see what I am driving at, [p. 295] sir?

A. I think I do.

Q. So what you are looking at is whether or not the store clerk or whatever example we want to use in any way added to or provoked the difficulty that resulted in his death. And if you find that the killing of the deceased was unreasonable in light of any provocation, if there was any, then you will answer special issue number three yes. If you find that the killing was not unreasonable because of the provocation by the store clerk, then you would answer that no. Okay, special issue number three with regard to its answer has the same impact as either of the first two. If you answer special issue number three no by a ten to two vote, I have no discretion but to assess punishment at life as opposed to death. In that case, if there were two yes and one no answers, it still would result in life imprisonment in the Texas Department of Corrections. If there are three yes answers, once again, the punishment is assessed at death by lethal injection. Do you have any questions with regard to the instructions or [p. 296] the explanations I have given you with regard to those special issues?

A No, sir. I don't think so.

Q Is there anything we have talked about up to this time, Mr. Hoover, that presents any problem to you?

A No, sir.

THE COURT: Mr. Hobbs, do you have any questions?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Yes, Your Honor. Good afternoon, Mr. Hoover. My name is Carl Hobbs, and I am an Assistant District Attorney assigned to prosecute in this case. As the Judge told you, we are looking at capital murder in this case. The Judge has pretty well gone over a large part of this, but the first part I am going to be talking to you about is the first phase of the trial. The guilt or innocence phase of the trial, when the jury must decide whether or not the defendant is guilty of the offense with which he is charged. The rights which are accorded to the defendant is explained to [p. 297] you by the Judge apply both – equally in both phases of the trial. The burden of proof is upon the State to prove the case beyond a reasonable doubt. Now beyond a reasonable doubt, I think is not beyond all doubt or beyond a shadow of a doubt because if it was beyond all doubt you would have to have been there and actually seen what happened, and if that fact were the case, you would be a witness and not a juror. Do you have any problem with that, sir?

A No, sir.

Q Okay, now, the burden of proof in proving beyond a reasonable doubt does not – the law does not require the State to prove a motive, why the defendant did what he did. It is sufficient that we show the actions of what happened. You have a problem with that, sir?

A No sir, I think I understand.

Q Now, your job as a juror, should you sit as one of the twelve will be – is to judge the facts. The jury hears

the facts and establishes what the facts were, to judge the credibility of the witnesses and that means how much, if any, of the testimony of a given [p. 298] witness you choose to believe. You can believe all of it, part of it or none of it, and to resolve conflict. Conflict, in and of itself, I make the statement is not reasonable doubt. As an example, say that I go, I am going to be the defendant. I go into a convenience store where the clerk, Ms. Hamilton, is behind the cash register, and the court reporter is also present in the store. Okay, I go in and rob them, and then I come and I'm caught, say later on. During my trial they describe me as being the person, and identify me as being the person that committed the offense. Ms. Hamilton said I had tan pants on and the court reporter said I had dark blue pants on. Okay, that is conflict. But both of them said I was the robber. It is irrelevant and immaterial as to what color pants I had on. It is whether or not I committed the offense. Do you have problems with that?

A I follow what you are saying.

Q Okay, now, also what must the State prove beyond a reasonable doubt? It is the elements of the offense and in this case, it is the [p. 299] elements set out in the indictment: That it was Gary Graham, that he committed the offense; that it was in Harris County; that it was on or about May 13th, 1981; and that the defendant, Gary Graham, did, while in the course of committing or attempting to commit either, either one, the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. That is what the State must prove to you beyond a reasonable doubt. That and only that. Do you have any problems with that?

A The question you are saying whether the robbery actually took place or not or the attempt, either one, right?

Q Yes, sir. Because robbery is defined in our law, capital murder is the commission of a felony along with the death of an individual. We are talking about the commission of robbery or aggravated robbery accompanied by the death of the individual. Now, robbery is defined in our code as being a person commits an offense of robbery if, in the course of committing theft as defined in the code and with intent [p. 300] to obtain and maintain control of the property, intentionally and knowingly or recklessly causes bodily injury or fear of bodily injury and death by using and exhibiting a deadly weapon, okay?

A Yes.

Q Now, in the course of committing theft is defined here on the board, sir. That means conduct that occurs in an attempt to commit it, during the commission of or immediate flight afterwards. Okay?

A Okay.

Q So, in essence, you can have the offense of robbery, it can be committed by the mere speaking of words and getting no property. In essence, let me give you an example. If I came up and went up to Ms. Hamilton and in the, say in the convenience store and I pull a pistol on her and demand the money from the cash register and a police officer walks up behind me and sticks a gun in my back and says drop it, I fully have committed the offense of aggravated robbery, okay?

A Okay.

Q Any problem?

[p. 301] A No, sir.

Q Okay, so what I am saying is in the attempt to commit the robbery where he doesn't have to get property, just so you believe the robbery is occurring or that the robbery actually occurred, either way?

A Yes.

Q Now, let me give you another scenario. You understand the law, if you believe beyond a reasonable doubt the testimony of a witness, the law says of a single witness in a given case, if all the elements necessary in the indictment have been proved beyond a reasonable doubt through a single witness, the law says that is sufficient if you believe that beyond a reasonable doubt. As an example of a single witness. It is sufficient for a finding of guilt for that offense, okay?

A Okay.

Q Do you have a problem with that?

A No, sir.

Q Okay, as an example, let's say Mr. Mock and his cocounsel there, Mr. Thornton, Ms. Hamilton and the court reporter are all inside this room here, this courtroom by themselves. [p. 302] I walk in through the door. I come up to Ms. Hamilton and I stop and demand her purse. Okay, the court reporter is over on the side where you are now, and it is a little difficult for her to see where I am at, standing in front of Ms. Hamilton over here on

this other side. Mr. Mock sees me, sees that I have a gun and he ducks down. Mr. Thornton sees me and gets back here, but he takes a good look at me. I shoot and kill Ms. Hamilton in the process of taking her purse. I get away. I am caught later on, and now I am coming to trial. Although there were several people in here, the court reporter was unable to see me. Mr. Mock was hiding from the gun, and he saw a general description, but he can't identify me. Mr. Thornton says Carl Hobbs is the one that killed her, and I saw him. If you believe beyond a reasonable doubt that the State has proved each and every element, along with the testimony of Mr. Thornton as to my identification, and I was charged with capital murder, which in the scenario I gave you, could you, if you believe Mr. Thornton's testimony that I was the robber [p. 303] beyond a reasonable doubt, base a conviction for capital murder?

A If I believed that was what the eye witness saw, I think so.

Q That is what I am asking. If you believe that testimony beyond a reasonable doubt?

A Yes, sir.

Q And, just because it was a single witness, it wouldn't bother you?

A I could hope it wouldn't bother me, but if the witness was convincing enough and the other witnesses weren't or they couldn't elaborate, I think I could go with the one witness.

Q Okay, sir. One of the factors we are going to consider is under our law, a person, when he reaches the

age of 17 is an adult in our State. The fact that an individual is young, say 17, 18, 19 years old, in your mind would the same fact situation be different for a 17 or 18 year old than a 35 or 36 year old man, say the same offense, just two different people, one is 35 and one is 17. The law says they should be treated equally. Will it cause a problem for you?

[p. 304] A No, sir. I think you would have to go with the same treatment for everybody.

Q Okay, sir, now, you realize it is one of the defendant's rights, he doesn't have to testify, and if he doesn't testify, you can't hold that against him. You have to look to the State to prove the elements of the offense beyond a reasonable doubt. One of those rights also is the State can't call him as a witness. Okay?

A Okay.

Q And the defendant doesn't have to – they can sit there and do nothing if they want to. That is their right?

A Yes.

A Now, upon a finding of guilt, we move into the second stage of the trial. The Judge has talked to you in reference to the special issues. Now, referring to special issue number one, whether or not the conduct of the defendant that caused the death, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. Okay. Deliberately [p. 305] does not mean premeditation. Would you agree with that?

A In reading the way it is written up there, I would agree that deliberately would not mean premeditation.

Q Well, Webster's Dictionary describes it as willful or voluntary. Could you accept that?

A Yes.

Q Now, it won't be defined by the Court in it's charge, as many other words will be, that are words of art and have special meanings. This is just good common sense. But you would agree with me that it doesn't mean accidentally?

A Right.

Q Now, you wouldn't have any problems referring to the evidence that was heard in the first phase of the trial, in the guilt stage of the trial in determining your answers to that. In fact, you would have to refer to it, wouldn't you?

A Yes, it would be kind of hard to come to any conclusion without a back check.

Q And based upon that, that testimony alone, you could make a decision whether or not special issue number one –

[p. 306] MR. MOCK: I am going to object to him leading. This is voir dire. It is not his witness.

THE COURT: Make it in question form.

Q As to special issue number one with the benefit of the previous testimony in the guilt stage, would you be able to answer issue number one?

A Yes, sir.

Q Okay, now, in the second stage of the trial, it is a separate state. The testimony from the first stage can be

reoffered, but also in this second stage, the testimony that the jury will be allowed to have is testimony that the Court determines relevant to the issue, okay?

A Okay.

Q That can be prior record, if any, other acts of criminal violence, if any, reputation witnesses, if any, to help in making your decisions, particularly as to special issue number two, okay?

A Okay.

Q Now, as to special issue number one, and before I go into that, now, the Judge has gone over quite a bit with reasonable expectation. Do you have any problems with that, sir?

[p. 307] A No sir, I don't think so.

Q Now, as to special issue number two we are talking about probability, some occasion of what the conduct of the defendant might likely be. Now, probability, is not going to be defined. As such, would you agree that it's likely or more than likely probable? How would you define probability in that context, sir?

A Based on what I heard, it would be whether in my mind the defendant would or would not be likely to do this type of thing in the future.

Q Okay, so it's not something that is something that you have to be absolutely certain of. It's something if you are fairly certain that it will occur that it's likely to occur, based upon the evidence, and once again, the State's burden is the same. It's the State's burden to prove to you

beyond a reasonable doubt the answer to special issue number one, two and three, if it is submitted is yes.

A I sure would like to see all the evidence I could.

Q Now, in speaking as to special issue number two and answering that question as to the probability [p. 308] would you agree with me that in a given capital murder, and we are going to be talking about murder in the course of committing robbery, that the particular details of the crime, itself, would aid you in some manner in determining and answering that question as to the probability of the defendant of committing future acts of violence, how did he act in this given situation?

A Would you run this by me again? I kind of got lost on that.

Q Now, would you agree with me, sir, that in answering this question as to the probability of future acts of violence, that the acts, the details of the offense which the defendant had been convicted – has been convicted of in the case, in the case, itself, those actions, what did he do, how did he do it, when did he do it, what were the circumstances, aid you at least partially in answering this question?

A Yes.

Q How did he act this given situation?

A Yes.

Q It give you a point of reference.

A Well, I would have to have heard it already, so I think obviously, I would have to say that that [p. 309] would weigh on whatever decision I came up with.

Q And then everything, other evidence, if any, you would consider to help you?

A Whether or not that probability exists? Yes, sir.

Q And special issue number three may or may not be submitted, depending on the evidence and the Court has gone over that with you, and you don't have any problems with that?

A I think I understand that one.

Q Now, as to answering special issue number one and two, you have no conscientious or moral objections or religious grounds for opposing the death penalty, do you, sir?

A No, sir.

Q And then, in a proper case, now criminal acts of violence, now that can be as little as an assault can be a criminal act of violence. If I slap Mr. Mock, that is a criminal act of violence and if I walk out and slash your tires on your car, that is a criminal act of violence, as well as shooting at somebody. Aggravated assault, robbery, aggravated robbery or murder. Sir, do you believe that capital punishment in referring as to special issue number two, in [p. 310] particular, that those criminal acts of violence would have to constitute something no less than murder, or would other criminal acts of violence be in your mind sufficient to show you to answer that question as to probability of the defendant's future conduct, as little as criminal mischief, sir?

A Well, I don't know what criminal mischief is, but like I say, when in my own view of it, when you get into a situation like this, you have to look at everything that has

been said and it all fits into what I personally think that the defendant would or would not do. I'm not knowing if I'm answering exactly.

Q You would want to look at his conduct, not only in the given instance, but whatever evidence might be there in an instance, you are telling me that you are going to go into the penalty stage with an open mind, and you are going to look at all of the evidence presented, and the Defense doesn't have to present any, but they can if they so desire to reputation that a given situation as in a hypothetical situation, we can't talk about the facts of this case, say for instance the defendant brought in fifty or [p. 311] sixty witnesses that said he was an exemplary person, he led an exemplary life and this was the first time something had happened. You'd take that into consideration, wouldn't you?

A Yes, I think you're talking about a capital offense here, possibly you know the death penalty and I think you have to weight anything that is brought into it very carefully, no matter what it is.

Q And are you telling me, sir, that if you are shown that evidence where you are convinced beyond a reasonable doubt that the evidence to those special issues should be answered yes, would you have any hesitation if you had – if it had been proven to you beyond a reasonable doubt, to answer yes, knowing that yes answers would cause the court to have to impose the death penalty?

A If you can convince me beyond a reasonable doubt in my mind, yes sir, I could.

Q Just as a point that wouldn't be an impossible burden, impossible burden upon the State in looking at it, my question is this: from your viewpoint, the State's burden, as the Court has talked about it and as I have talked about it [p. 312] is beyond a reasonable doubt. In your mind that is not defined. I have told you what I thought it was.

A Right.

Q Okay, to achieve that level of beyond a reasonable doubt, you are saying that it is an achievable level, it is not something that is impossible for the State to do from your standpoint?

A No, sir. I think if you presented enough evidence to convince me and here again, I, right now, I don't know what it would take or not take to do it. It would be very hard for me to convict, but at the same time, I think that if you were able to convince me of this person's guilt on the matter, I could, you know, vote guilty on it, or answer the question yes, but like here, again, I say, it would take a lot more from the Prosecution to do it, but I could give you the yes on all three issues if it came down to that.

Q Okay, now, the burglary that occurred that you served on, the criminal jury on, was the jury able to reach a decision? I don't want to know what you decided, but did the jury reach a [p. 313] decision?

A No sir, the jury did not reach a decision.

Q Did that experience in any way cause you to have problems with sitting on a case such as this, sir?

A No sir, I don't think so.

Q Were you in Vietnam?

A No, I wasn't.

Q The experience, the bad experience you had with the officer in giving you the ticket, would that in any way affect your ability to judge fairly and impartially the testimony of police officers?

A No, sir.

Q Do you have any questions of me, sir, on anything we have talked about or something that is not clear to you?

A No sir, I think I understand, you know, why the stuff as it is written up there. I understand.

MR. HOBBS: The State will pass the witness.

THE COURT: Mr. Mock, before you begin, Mr. Hoover, let me ask you one other question. We anticipate it will take approximately two weeks to complete jury selection in this case. [p. 314] We anticipate that approximately the 26th we will begin testimony hopefully, and that I do not anticipate it to take more than a week to try the case. Would that in any way create a hardship for you?

A We had a vacation scheduled for that week, but I can postpone it.

THE COURT: Can you reschedule it?

A Yes.

THE COURT: You may proceed, Mr. Mock.

EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court. My name is Ron Mock. I am sitting by Chester Thornton seated to my left. First of all, I would also like to thank you for participating in our criminal justice system. You have been here what, two days before we finally got to you, but it's most imperative that we are able to talk to you, especially in light of the seriousness of the issue we are trying. I noticed that somewhere around here you are a native Houstonian?

A Yes.

Q And went to Aldine High School?

[p. 315] A Yes.

Q You live in that Northeast area?

A I live out Northside. In fact, I live in the same house I grew up in.

Q You still live in the same area, generally?

A Yes, sir.

Q And you work for?

A City of Houston, Parks and Recreation for the last thirteen years, just about. It's going to be thirteen years.

Q Probably since you got out of Texas A & M?

A I went into the Army and spent four months on active duty and came out and went to work for the City Parks and Recreation.

Q What area were you in in the military?

A I was in through basic training and combat.

Q And while at Texas A & M you majored in Park Administration?

A Yes.

Q Do you have some kind of kindred experience with the outdoors?

A I enjoy the outdoors a lot, yes.

Q Park Administration is something that one wouldn't normally think about if you're going to college. When did you first get the idea or inclination [p. 316] it might be a vocation that you might enjoy, sir?

A Somewhere around 1966, about my sophomore year. I wasn't happy in my major which, at the time, had been accounting, and so, I went to the vocational testing services up there and took some aptitude tests or something like that and I took some tests and they directed me into several different possible areas, which being in the outdoors had a lot to do with it.

Q Were you in the corps?

A Yes.

Q What was your highest rank in the corps?

A Lieutenant.

Q What church do you attend, sir?

A I don't attend regularly. I'm a member of Highcrest Methodist.

Q Now, in 1971, you were a juror in a criminal case?

A Yes, sir.

Q Is there anything about that experience that leaves a sour taste in your mouth for the criminal justice system for the State or the Defense?

A Well, as I said earlier, when asked the jury was [p. 317] not able to come to a decision on it, I think in my own mind, I would have been much happier had the jury been able to reach a decision in the case, but you know, it's not one of those things I have lost sleep over.

Q I can understand that. You indicated that you are or your spouse have studied law. Would you expound on that a little bit, sir?

A No sir, it says family. One of my uncles went through law school. He never passed the bar. He didn't take the test. He just wanted to get his law degree.

Q You indicated that you had some kind of interest in a criminal case, some kind of child abuse case?

A No, I'm sorry for misleading you on that. My wife gave birth to a stillborn baby about a month ago. I would be rather sensitive in handling a child abuse case and at the time I filled this out I didn't know what type of case was coming up.

Q That is fair. For your information there is nothing to do with that in this case.

A All right, sir.

Q Would you, Mr. Rayburn, share with me, sir, [p. 318] your feelings about the death penalty?

A Unfortunately, I think that the death penalty is probably the only effective way right now in deterring some offenses. You know, it would be nice if we lived in a world in which people never did anything really to harm anyone else or to kill anyone else, but we don't live in that kind of world, and my personal view is that the death penalty is a deterrent in many instances to crime.

Q By unfortunately, I take it that your explanation was that you wish we lived in a world where you didn't have to have it?

A It would be really nice if we lived in a world where there wasn't any murder, rape, child abuse, robbery or whatever. Unfortunately, I don't think that we are in such a situation.

Q How long have you had these feelings, sir? If you can remember?

A I really, you know, I don't remember any particular time in which I said, hey, all at once, I'm in favor of the death penalty. I don't think I have ever been against the death penalty. I know, you know, when I was growing up in Texas we had a death penalty for certain [p. 319] things. I know it was dropped for several years by the Supreme Court, more or less put a hold on it or outlawed it. I know that in Texas again the death penalty has been put back in effect for certain crimes. I could not tell you off the top of my head what all the crimes are which would come under the heading of the death penalty.

Q Do you also understand, sir, that we are guided through a criminal justice process by some statutes

enacted by the Legislature called The Code of Criminal Procedure?

A Yes, sir.

Q Because on the trial of a capital offense, a defendant does not have a choice of waiving or giving up a right to a jury trial, thereby, letting the Judge hear the case. This is the only instance where if you get to the punishment phase that the jury must assess punishment. Now, because of this we must discuss your feelings on punishment, if we get that far, but is there any way that you would hold it against the defendant or might think that because we are discussing the punishment phase that we are looking ahead to him being found guilty?

[p. 320] A No sir, I don't think at this point, I'm sure you're not looking forward to the defendant being found guilty nor am I because I couldn't vote one way or the other, sir, until I heard what the Prosecution has to say.

Q And you wouldn't hold that against him because we are discussing things we are mandated to discuss if we are going to discuss them?

A No, sir.

Q Toward that end, sir, should we get to the punishment stage, the jury verdict slip is different from the guilt or innocence stage on the punishment. You are asked to determine whether a person committed an offense as alleged in the indictment and based on the evidence and you also will be required to take an oath that based – that you will a true verdict render according to the law and the evidence. Now, when we talk about the punishment phase we are talking about as to special issues. These

special issues must be entered unanimously in order for the end result to be that the Judge, as mandated by the Code of Criminal Appeals, not the jury, sentences the defendant to life – I'm sorry, to death. Now [p. 321] would the fact that your answering special issues and only those special issues, even though you know it may result in the end result, but you are not assessing the death penalty, would that affect your ability to be fair and impartial or would it make it easier for you to answer the questions yes, knowing that you are not in effect assessing the death penalty, but it is in effect, the Judge?

A I'm not sure I understand that. Could you try that again?

Q I may not understand myself on that one. But let me see. Simply, would the fact that the Judge would be the person sentencing the defendant to life make it easy for you to review the issues presented and answer yes because it is not you doing it, it's the Judge doing it, and it takes some of the pressure off of you?

A To me, I don't think it would make that much difference. I would have already, or somewhere along the line there, in my own mind, I would have come to a conclusion whether it was the Judge doing something or me, personally, standing up or you standing up and doing it. I don't think it would make that much difference.

[p. 322] Q Because basically, the end result is there?

A I think once I reached, in my own mind, the conclusions that I am going to come to, then I think it gets

into no matter who it is that it's actually going from that point on, I have still reached it in my mind.

Q Okay, can you conceive, sir, the point that you are talking about in your mind? Can you conceive a fact situation that would put you at the point that you are – would take to get into your mind in order to vote yes?

A If I understand the question right, that you are saying, sir, I think I could. I'm not – yes, I think I could.

Q Could you share that with us, please, if you can? I'm not trying to ask you to do the impossible.

A I don't know that I can put it into words.

Q Okay.

A It's kind of a feeling inside of me. It's about this whole process, that, you know, it's very hard. I would have to hear the entire thing. I would have to hear everything, every detail of information that I could before I can answer any of the questions, one way or the [p. 323] other. Coming to the conclusion in my own mind would be a very hard process for me, but yes, I could draw my own conclusions.

Q That is a fair statement, and again, let me assure you that we are not here and none of us are going to argue with what your feelings might be.

A Right.

Q And there are no right or wrong answers because what we are just trying to do is get to know you in a very limited time to determine how you feel about certain things, and if you can't answer them, I assure you, I'm

not going to try to argue with you. If you can't tell us that will be fine, too.

Now, as to special issue number one, can you see a situation where the person might go into a store with a gun, with the intention of robbing and somewhere along the way, as plans sometimes do, something goes awry, things change and as a result somebody is killed?

A Well, I can see where somebody could go in with the intention of robbery, and of course, you know, things could happen which could cause somebody to be killed. I might as well say right [p. 324] off the bat, though, I think, anytime you go into a place with robbery in mind, carrying a firearm, you have to go in with at least a very strong possibility in your mind that you may have to end up using the gun.

Q Yes sir, I can understand that, but – well, do you feel as a result of that, sir, that the person has already formed in his mind the intent to kill, if necessary?

A No sir, I don't think that it's necessary that the person has formed intent to kill at that point. I'm just saying anytime a person goes into a store or anywhere else with a gun in their hand, they have to be aware of the consequence of their actions that they may get into.

Q Okay, now, along the same lines, although the person may not have formed the necessary intent to kill prior to going into wherever the person went into with the gun, would you automatically find that if the result of going in there with a gun, he used it to kill somebody, although he might not have had the initial intent, could you find that the killing was deliberate, automatically?

Do you understand the question [p. 325] I was trying to ask?

A I'm trying to formulate an answer on here.

Q All right.

A The act squeezing the trigger or something like that could come up whereby the person went in the store, I think, without intending to use the gun, however, I can see some circumstances or things that could arise in which a person pulled a trigger. Okay, I don't think necessarily that the person went in there intending to kill somebody, but I think that you do have to consider the fact that the person did go in with a firearm.

Q Well, could you ever conceive of a fact situation where a person went into a store to rob with intent to rob, without the intent to kill and did kill and find that that person did not deliberately kill?

A In my own mind, I could think of a circumstance in which the person killed somebody as a result of maybe a struggle or something like that and the gun went off. I can see that, yes, that person did kill somebody. They didn't go into the place deliberately to kill anybody, but the act did happen.

[p. 326] Q Okay, as relates to special issue number two, whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, sir, what kind of information would you like to have brought to you to help you to make that type of determination?

A Everything I can get ahold of, whether it's character witnesses, reports from the probation people or

whoever is involved. I'm sure there is bound to be somebody who has talked to this person, somebody who knows the person, whether or not the person has a criminal record, and if so what kind of crimes, maybe. Even, I think when you are getting into this thing that is presented, it can't hurt. It has to help me to draw whatever conclusion I'm going to draw on it.

Q Now, would the fact that the person had committed other criminal acts of violence automatically make you vote yes to special issue number two?

A I don't think that any one or two admissions of that nature would automatically cause me to vote. I think people are very complicated, and I think it takes a lot of things before I could [p. 327] draw my conclusion one way or the other, sir.

Q Do you think, sir, if a person were sentenced to life in the penitentiary that they would be a continuing threat to society?

A Well, sir, there is not too much liklihood [sic] of that happening while they are in the penitentiary. I don't know for sure what would happen when somebody gets out of the penitentiary, if that were the situation, I, you know, I would like to hope that if somebody goes to the penitentiary or I would like to think if someone goes to the penitentiary that they actually learn something from the time they are in there, and I don't personally- personally, I don't regard penitentiary time as being the complete - just a lockup.

Q Just a wholesale warehousing?

A I would like to think that it is not.

Q And you also understand, sir, that in considering the punishment phase of this trial, if we get that far, that in assessing punishment, you could not consider whether, if you gave a life sentence when or how or what would happen to the person as regards to parole. That is completely within the purview of pardons and [p. 328] paroles and not to be alluded to?

A I'll take your word for it. The jury's duty would be to say if that is life imprisonment, that is the jury's part, that is where it ends. After that, I guess it is the Department of Corrections'. I don't know. We are past that point.

Q Special issue number three is only presented to you if it is raised by the evidence, that being a determination made during the trial by the Court. Can you, sir, in light of the fact that self-defense – well trying – strike that. Do you believe in the idea of self-defense?

A In the idea of self-defense as such, yes.

Q Do you also understand if you are committing a crime and happen to kill somebody because they are trying to kill you, you are not availed the opportunity of that defense as a method of getting out of what you started? Do you understand that? Do you have any problems with that?

A No sir, I don't think so.

Q Do you agree or disagree with it, not the issue but the fact that the question I was asking you, if you still remember it?

[p. 329] A I do not think that if a person got into an act, I don't think they should be allowed to claim self-

defense as a means of getting out of it. Does that answer your question?

Q Yes, sir. Yes, sir. Can you in your own mind conceive of a set of facts and circumstances whereas the dead person did something to provoke the defendant, who had no intention to kill and as a result of what he did, not necessarily pulling a gun, we don't have to get to that extreme of pulling a gun or knife or something else, but whatever he did, if only to protect himself to swing out, to grab, to move, to push the defendant during the course of the robbery, thereby provoking what might be an immediate act of reaction?

A I think, sir, that in all honesty, I can view some things, would not even have to be an act, it can be a word in which conceivably it could trigger the shooting.

Q Let me ask you one question, sir. Are you now of the frame of mind that if you were sitting in this seat where Gary Graham is sitting, that you would be comfortable, having a person of your convictions making a determination, one as [p. 330] to guilt or innocence, and two, as to life or death with regard to your person?

A Yes sir, I honestly think that I could at this point.

MR. MOCK: Your Honor, that is all we have of this witness.

MR. HOBBS: The State will accept.

MR. MOCK: We will accept.

THE COURT: Will you swear the juror, please, Ms. Clerk?

(At this time the juror sworn by the Clerk)

THE COURT: Mr. Hoover, you are now excused. As I have told you, it will probably be, according to our time table, hopefully a week from Monday when we begin testimony. We have your home number and your business number that we can reach you at. We'll give you several days advance notice, hopefully, as to when the testimony would begin. It would not be before the 26th, I don't anticipate.

MR. HOOVER: The reason – we may go ahead and take that vacation a week early.

THE COURT: I don't anticipate that being the situation. We have two jurors in two [p. 331] days. We have to have twelve. So I don't anticipate that happening. You might, if you are going to go out of town on vacation, you may want to take the phone number of the Court with you and possibly check in from time to time while you are on vacation to see what our situation is. Mr. Pollinger can give you the phone number of the Courtroom and the names of the Court personnel that you can reach to see where we stand. We will contact you far enough in advance. Please do not – I don't know or anticipate there will be any media coverage about this case until the trial actually starts, however, in the interim, one word of caution. Please do not speak to anybody or review any media coverage with regard to whatever allegations may be pertinent to this case. With that, you are excused, and Mr. Pollinger will provide that information for you. If you need any written verification for your work as to the fact that you have been here, Ms. Hamilton will provide that for you.

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[p. 540] MR. DENNIS GRAHAM, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q In the interest of time, Mr. Graham, obviously, we will be as brief as we can be. Let me ask you initially about the comments I presented to the panel as a whole this morning. Do you have any questions, areas or things I discussed with you on the panel as a whole that is unclear for you?

A I don't have no questions.

Q None of the items I discussed presented any problems for you, presumption of innocence, burden of proof, the order in a criminal trial as to the fact we have a two phase trial system and the fact that the defendant is presumed innocent until proven guilty, all of these principles, you understood?

A Pretty much.

Q As I told you, Mr. Graham, this is a very serious proceeding, and also very time consuming proceeding that our law requires that we do it this way. In the interest of [p. 541] the community and specifically in the interest of the defendant, Gary Graham. As I told you, the 12 persons who serve on the jury in this case will be faced with the decision if the punishment phase of the trial is reached, and only if the punishment phase of the trial is reached, of determining whether or not the defendant, if he is found guilty, is to be sentenced to life in the Texas

Department of Corrections or to death by lethal injection. It is obviously paramount, and that was the reason I spoke with you specifically about this before lunch, that we know you [sic] individual feelings with regard to the death penalty as a type of punishment. Our law requires for both sides that I ask if you have any religious, conscientious or moral scruples against the imposition of the death penalty, as the punishment in a proper case, in a case that you would deem proper?

A. No, not if it is in a proper case.

Q So, what you are telling me is if the State convinced you beyond a reasonable doubt that the defendant was guilty and you had voted a verdict of guilty of the offense of capital [p. 542] murder, and you were convinced beyond a reasonable doubt that the punishment should be assessed at death, that you could return a verdict, knowing full well that I, as a Judge, would sentence the defendant to death, is that correct, sir?

A That is correct.

Q Obviously, we are not talking about every capital murder case. We are talking about one that you would deem proper, and in the trial of a capital murder case, there is a definite proceeding that is followed by which a jury communicates its verdict to the Court. As we told you before lunch, I do not have the authority to change that verdict. The verdict is or the verdict that is returned by the jury is done in response to special issues that are submitted to the jury. I do not send in with the Court's charge a blank piece of paper and tell the foreman to write down life or death. It is not done that way because there are deliberations that the jury has to consider on the

punishment phase of the trial that go beyond the deliberations that took place on the guilt or innocence phase of [p. 543] the trial. Those deliberations pertain to two special issues, at least they are presented to the punishment phase of a capital murder trial that is tried in this Court throughout the state and throughout this country. Those two special issues are tacked to the bulletin board, which is to your right. Let me make some general comments about these special issues before we get into a discussion as to what they contain. Each of the special issues on the board, if the jury is to answer the special issues yes requires a unanimous verdict by the jury. If the jury is to answer either of the special issues or both or all three, possibly, no, a vote of 10 to 2 or at least 10 of the jurors are required. If the jury votes no on any of the special issues requires at least 10. It does not require a unanimous verdict for a no answer, but it does for a yes answer. If the jury answers both yes or possibly three, all three special issues yes, then the jury has communicated to the Court that the defendant is to receive the death penalty. His punishment is to be assessed at death. If there is one no answer [p. 544] or more than one no answer, the punishment is assessed at life in the Texas Department of Corrections. A unanimous verdict of yes to all special issues submitted, the punishment is death. Do you understand?

A Yes, sir.

Q Once again, the State has the burden during the punishment phase, as it did on the guilt or innocence phase. The State has to prove beyond a reasonable doubt that your answers should be yes to each of those issues. The defendant has no burden to present anything. Once

again the burden is completely on the State of Texas. Then you answer should be yes, do you understand that?

A Yes.

Q I do not have the authority to change your answers or assess punishment that is in contradiction with your answers. If your punishment mandated by your verdict is the death penalty, I must assess punishment at death. I cannot contradict your punishment and that is true either way. If you vote the death penalty, I can't change it to life. If you vote life, I can't change it to death. [p. 545] Do you understand that?

A I understand.

Q I would ask you to take a moment to look at special issues number one and two that are pined to the bulletin board. Read them and see if you have any difficulty understanding them, and then we will talk about them. The first two issues that are on the board. Do either of those present any problems to you as far as being able to understand what is presented on those cards, sir?

A No, they don't.

Q Let's talk initially about special issue number one. That issue there is whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another person would occur. I think it is apparent that when we submit that issue to you, it is calling upon you to reflect back upon the testimony that you have heard on the guilt or innocence phase of the trial with regard to the conduct by the

defendant in taking the life of the deceased. In this particular case, Gary [p. 546] Graham, allegedly taking the life of Bobby Grant Lambert. Now, in reflecting back on that testimony, you are to evaluate that testimony in light of key words that are included in that special issue. The first word that I consider to be a key word is the word, deliberately. In choosing to follow the course of conduct that the defendant has followed in which the death of the deceased resulted. Did he do so deliberately? Was it his conscious objective to do that? Was it his intention to do that? Obviously, we are looking at something that is the opposite of accidental. It is a voluntary fact on his part to do so, and secondly, did he reasonably expect that the death of the deceased or another person would occur. Should he have reasonably expected or did he reasonably expect that this would happen, this would result in death. I think that two hypothetical situations may show a variation in how you might answer the issue.

Assume that you are working or that someone is working at a Stop and Go as a clerk, and a person walks in with a pistol, walks up [p. 547] to the clerk and demands the money that the clerk has behind the counter. The clerk fills up the bag, hands it to the defendant and the defendant takes, the robber takes two steps toward the door and just turns, in cold blood guns down and kills the clerk behind the counter. The clerk has done nothing to provoke the situation, has not pulled any weapons or done anything. In viewing that course of conduct by that robber, in that situation, you as a juror, may say yes, the conduct was committed by the defendant deliberately. It was his conscious objective to walk in the store with that pistol and his conscious objective to

shoot and kill that clerk and in shooting the clerk he did expect to cause that clerk's death. You might very well answer that yes, it was done deliberately and he reasonably expected that the death would occur. After answering special issue number one, you then go to special issue number two, which deals with a prediction by the jury as to the future of this defendant. And assuming that he would not in a situation he finds himself, but assuming he is out [p. 548] among the other members of our society. Is there a probability that if the defendant were returned to that society that he would commit criminal acts of violence that would constitute a continuing threat to society. Now, that is not to say that it is a certainty. Obviously, we could not predict the future with certainty. All we are asking is, of the jury, is to predict to the degree of probability. Is it more likely than not that he will commit the act of violence. Acts of violence obviously is a term of art. It is not going – it is not very specific because our law encompasses many crimes that qualify as acts of violence. If you are walking toward the elevator and bump into someone in the hall intentionally and that person found it to be offensive, you possibly would have committed a Class C misdemeanor assault. Or by the same token at the other extreme, we have the offense that Mr. Graham stands charged with, the offense of capital murder, which is at the opposite end of the extreme. In between there are a multitude of things. Aggravated robbery, aggravated rape, and aggravated [p. 549] kidnapping, assault, acts of violence against property. Someone rips the seats of your car with a knife. These are all acts of violence and it is broad because our legislature intended that you, as a juror, would call upon you conscience in answering this

special issue. And do you further find that these criminal acts of violence that the defendant probably would commit constitute a continuing threat to society. Would the defendant, if he were replaced in society commit these criminal acts of violence to the extent he would be an ongoing threat to society or those around him. Do you understand that, sir?

A I do.

Q Okay, have you any problems understanding either special issues one or two?

A No.

Q It is obvious that what we are looking for is someone, as I told you previously, who can enter into this type of situation with an open mind. Someone who will not have a knee jerk verdict based on what he has heard in guilt or innocence phase of the trial, but [p. 550] someone who will deliberate on the special issues and hold the State to the burden that our law requires. Can you do that, sir?

A Yes, I can.

Q Okay, now, as I said if you serve as a juror in this case, and the punishment phase is reached, you will consider at least those two special issues. I do not know the facts in this case. I do not know anything about the facts in this case, nor do you. Only the lawyers know something about the facts in this case, but our law requires on the punishment phase of the trial that if there is any evidence, no matter how slight and no matter what the source is that the person who was killed, in some way added or contributed to the difficulty by some form of

provocation, this must be incorporated in another special issue for the jury's consideration. It's not to say that it provides any defense for the defendant by saying that he defended himself against some actions by the deceased, because the defendant, in a capital murder case, has been found guilty of capital murder, once you are on the punishment phase, and by provoking [p. 551] the difficulty in my example of the Stop and Go, my walking in that store with a pistol, even though he may not have an intent to take someone's life, he has provoked the difficulty and cannot claim self defense if that clerk were to pull a pistol out from under the counter. If you would, sir, read special issue number three, and we will talk about that some more. In my own opinion, I don't think special issue number three is drawn as clearly as one and two. It is a little more difficult to understand, but what we are trying to view here is the conduct of the defendant in killing the deceased at this point in time you voted guilty yes, he killed the deceased, but what we are doing is asking you to consider number one, was there any provocation to the problem of either person that was killed. If he did in some way assist in provoking the problem. Did the defendant in taking the deceased's life act unreasonably. And if he did, if you feel after the verdict has been or after the evidence has been presented, that he did act unreasonable [sic] in taking the deceased's life then [p. 552] you would answer that special issue yes. If you found that I did not act unreasonably in taking that person's life, then you would obviously say no. I realize it is very difficult to conjure up in your mind any feeling that a person in defending his property is acting in a fashion that you would condemn because he is seeking to

defend his property. The clerk for pulling the pistol out from under the counter, but the law is not seeking to condemn that person who was killed in any way. The only reason this is pertinent is because this issue is presented to see if there is any type of mitigation or lessening of what the punishment should be because the dead person, in some way, contributed to the difficulty. Special issue number three has the same import as either of the first two special issues, if you, as a juror were to answer special issue number three no, then the defendant would be sentenced to life in the penitentiary, just as he would if you were to answer either special issues number one or two no. For the purposes of example, let's talk about the situation in [p. 553] which the person, the robber has walked into the Stop and Go and not intending to kill anyone, but to just take the money. Just to take the money, the property. He takes the property or the money from the clerk and turns to walk from the store and in turning to walk from the store, the clerk pulls a pistol from under the counter and shoots him in the back, and then, as the defendant turns, he is shot again by the clerk, and so he fires and kills the clerk. Now he has not harmed the clerk up to that point in time. He has done nothing to take money from him and he kills the clerk. He is trying to stay alive and takes another person's life to stay alive. He can't claim self defense. The clerk has defended his property, but the defendant is still guilty of capital murder, even though he didn't fire first. He is still guilty of capital murder because he has committed the felony offense of aggravated robbery, and in so doing, killed the store clerk, even the clerk – even though the clerk fired at him first. You can't view that situation in

opposition to the situation where he walks in [p. 554] and cold bloodedly goes to the clerk and the clerk has done nothing to provoke him at all. He is standing there and he is gunned down in cold blood. You can see, even though the defendant in both the hypothetical situations is guilty of capital murder, you might view the actions of one differently with regard to a decision in you mind as to whether should one live and should one die. Possibly that. Once again, what we are trying to find is to insure and once again I'm not trying to dissuade you from any of your opinions or we have to find out and make sure how you understand that we are hoping to find people who will have an open mind when they consider these issues. Do you see the distinction in the fact situations I gave you, sir?

A Yes, I do.

Q Do you see in one situation that the deceased in some way has added to the provocation or his position in the situation by pulling the pistol and firing it at the defendant, even though the defendant did not do harm to the clerk by taking the property?

A Yes, I understand that.

[p. 555] Q Do you feel in considering these special issues you would have an open mind and you would not vote automatically one way or the other until you have heard all of the testimony in the case?

A I wouldn't say nothing until I have heard everything.

Q Okay, you understand, sir, that the mere fact that you have found a person guilty of capital murder should

not be sufficient for you to assess punishment at death. In other words, there are plenty of cases tried in this Court where someone has been murdered where the death penalty is not an alternative. What we are talking about is the situation as has been explained to you as, as I have explained to you what constitutes capital murder, but your decision with regard to the defendant being sentenced to death should only be made after you heard other testimony with regard to these special issues. Do you understand that?

A Yes, sir.

Q Could you agree to abide by that?

A Yes, I could.

Q Do you have any questions about what I have [p. 556] talked about up to this point, Mr. Graham?

A No.

Q The lawyers will now have a chance to talk to you. Mr. Hobbs, the Assistant District Attorney, and then Mr. Thornton will be talking with you. Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Hello, Mr. Graham. As the Judge told you, my name is Carl Hobbs, and I am an Assistant District Attorney, and I am assigned to prosecute in this case. From time to time there might be other Assistant District Attorneys that will aid me, but right now I am it, okay?

A Okay.

Q I am looking at the form that you filled out, this long form. There was some areas that I see why you didn't answer some of them because you are single and they apply to your spouse. Were you in the military service at all, sir?

A No, sir.

Q Okay, do you have a particular religious [p. 557] preference?

A No.

Q Okay, would you consider yourself a believer, but no particular –

A I am a believer.

Q Okay, now, has anybody – you are – you or anyone in your family or very close friends been the victim of a crime, car stolen or house burglarized, something stolen from you?

A I had a friend who had a truck stolen.

Q But nothing from you?

A No.

Q Have you ever been a witness in a criminal action?

A No.

Q Or any of your family?

A No.

Q Have you or any member of your family or close friends been charged with an offense where they were the defendant?

A No.

Q Okay, you said you have a brother that is a security guard?

A Was a security guard.

Q What is he doing now?

[p. 558] A He is doing odd jobs, works a while and quits and works somewhere else.

Q In the aspect of, in some of the jobs you worked in a lot of food establishments, is that correct?

A That is correct.

Q In those aspects, at any time you were working in one of those were they robbed or some crime committed there?

A No.

Q You are very fortunate. Now, looking at the first phase of this case, or any case is the guilt or innocence stage, okay?

A Okay.

Q Before we even consider the special issues we have to look at the aspect is the defendant guilty or not guilty of the offense of which he is charged. Okay?

A Okay.

Q We are not going to be talking about the facts of this given case, these particular facts because the law doesn't allow us to do that. We are going to be talking in make believe facts or hypothetical situations, examples to generate comments from you. Okay?

[p. 559] A Okay.

Q Now, burden of proof is on the State. That is beyond a reasonable doubt. That doesn't mean beyond all doubt or beyond a shadow of a doubt, because if it was beyond all doubt, you would have to be actually present and if you were present and saw what happened, you would be a witness, not a juror. Would you agree with that?

A I agree with that.

Q Now, we don't have to prove why somebody did something, a motive. Does that give you a problem?

A No, it doesn't.

Q Okay, now, when we are coming back you, as a juror, have to decide the evidence that you hear and the testimony you hear from that stand any physical evidence, if there is any. Sometimes there is and sometimes there isn't. That might be presented. Now, you, as a juror, can believe all of what a witness says, part of what they say or absolutely nothing. That is your job. Now, we, the mere fact that we are here means that there is conflict. The mere fact that we are here. If we agreed, we [p. 560] wouldn't be here. The jury's job is to resolve conflict, okay?

A Right.

Q Conflict, in and of itself is not reasonable doubt, depending on what it is. Would you agree to that?

A I agree.

Q Now, also, our law states that an individual, when that individual attains the age of 17 years old, is

considered an adult for all purposes considering the law and the punishment set by the criminal law. Does that pose a problem with you, sir, the mere age of the defendant?

A No, it doesn't.

Q Okay, now, looking at the young man sitting at counsel table, here, he is young. We are looking at a very serious offense. The mere fact that he is a young man, would that cause you to either to be prejudice one way or the other to such a degree that you would have to go against your oath as a juror to a true verdict render, according to the law and the evidence presented?

A No, it wouldn't affect my decision.

[p. 561] Q Okay, now, when we are looking at the aspect what must the State prove beyond a reasonable doubt. The State must prove the elements of the offense. That is what we must prove beyond a reasonable doubt. That and only that. What are those elements? The Judge, remember when he read the indictment to you. I am going to go over the part in reference to capital murder because that is what I want you to consider. Okay. First of all, capital murder is also going to be the committing a murder and another felony. In this instance, robbery, or the offense of aggravated robbery. And I will give you a shorthand rendition of what murder is, the voluntary killing of another human being without legal excuse or justification. No excuse. No legal reason. And intentionally taking a life. We are going to be looking at that. Now, here are the elements: That it was the defendant, Gary Graham; that it occurred on May, on or about May 13, 1981; in Harris County, Texas; that the defendant did

then and there unlawfully, while in the course of committing theft, I mean committing or attempting to commit the [p. 562] robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Those are the elements.

A Yes, sir.

Q Those are the things that the State must prove beyond a reasonable doubt. Not what color pants he had on or not what color his car was, if there was one, or what color the – what quarter the moon was in that night. It is irrelevant and immaterial. Do you have any problems with that, sir?

A No, I don't.

Q Okay, now, those are the elements that the State must prove beyond a reasonable doubt. Now, when we are talking about that, let's talk about the aspect of a single witness. Okay. In a lot of instances, a crime is not going to be committed – many crimes – very few crimes are committed where there is a great amount of people involved. Sometimes it could be just a one on one crime where one person might have seen what had happened. If you believe that person beyond a reasonable doubt when that person got up and testified and [p. 563] said that the defendant did the killing and you believed that person beyond a reasonable doubt, the State has proven each and every one of those elements, could you base a conviction on the testimony of a single witness, with nothing more?

A I believe I could.

Q Okay, now, let me give you a hypothet. Let's talk about this. Okay. In a hypothetical situation, let's say this room is a convenience store, 7-Eleven. Okay?

A Okay.

Q And you are in the store and can you see the clerk, Ms. Hamilton right across the way there, clearly?

A Just the top of her had.

Q Let's say there is an obstruction, something like that where you are off in the corner of the store and about in the same situation except a little higher. You can hear or maybe get a glance, but like you say, you can't see her. Okay, now, let's sit Mr. Mock over here in the jury area with some type of pictures like this and Mr. Thornton is right here where he is at, right here in the open area [p. 564] where he can see you and he can see Ms. Hamilton, and I am going to be the person, I'm going to be the criminal. I come in through the door, okay?

A Okay.

Q I walk up to Ms. Hamilton at the register. I demand the money and she looks at me and she doesn't say anything. I demand the money. She doesn't do anything. I pull my gun and demand it and as soon as Mr. Mock sees the gun, he exercises some common sense. He is hitting the deck back there hiding. Okay?

A Okay.

Q You can't see me when you hear something going on, but there is an obstruction here. Mr. Thornton sees me, but he doesn't have any place to go and when I see Mr. Thornton I shoot and kill Ms. Hamilton. Okay, so

when I get caught later on and I am brought in, I am being tried for capital murder. Now, there was four people in this room or in the store, and the only person that is going to be able to say that I did it was Mr. Thornton. She is dead and he was ducking from the gun and he couldn't see, okay?

[p. 565] A Okay.

Q If you believed the State has proved each and every element beyond a reasonable doubt, Mr. Thornton got up and testified that Carl Hobbs shot and killed Ms. Hamilton in the course of that robbery and shot her with a gun, if you believe his testimony beyond a reasonable doubt, could you convict me of capital murder?

A Yes, I could.

Q Okay, now, okay, now, let's move on to the next aspect of this. We have – we are going to go into the punishment phase now. I have been found guilty of capital murder, and you are going to decide right now whether I live or die. Okay?

A Okay.

Q Now, what we are going to be looking at is, in the first phase you can consider all the testimony that you heard in the first phase of the trial. And the example we just gave you, what I did when I came into the store, okay?

A Okay.

Q Now, what I was doing, from the testimony that you heard from everybody. Now, as you can see, [p. 566] special issue number one, whether the conduct of the

defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another person would occur, okay?

A Right.

Q Now, needless to say that question, by its very wording, requires you to look at the situation during that first phase of the trial. What actually happened in the offense. I have been found guilty of it now and now that I am guilty of it, you have to look and see whether or not – what I did was committed deliberately. Now, the word deliberately is not going to be defined for you. Okay?

A Okay.

Q Webster defines it as being willful or voluntary. Does that pose a problem for you?

A No.

Q It doesn't mean premeditation. Would you agree to that?

A Yes, I agree.

Q And furthermore, it also doesn't mean accidentally. It means that I wanted to do [p. 567] what I did.

MR. THORNTON: I object to the State's leading.

THE COURT: Don't lead your witness, Mr. Hobbs.

Q Now, in looking at this word, now we go back down to the next part, and let me give you a hypothetical.

In reference to whether or not an act can be deliberate in a span of time? Okay?

A Okay.

Q Say I came – I had never met you before, never seen you before. I just walked through the door and I came up to you and I walked up and in front of you and say you had a red shirt on and I don't like people in red shirts. I just saw that red shirt and the first thing I did was walk up to you and hit you in the jaw as hard as I can hit you. Now, up until that time I just walked in and saw you momentarily and my act – could you conceive my act as being a deliberate act of hitting you just absed [sic] upon that split second I see the red shirt and don't like it and I hit you, my actions?

[p. 568] A I can see that.

Q Okay, now, when I come – now we are going to be talking now in the situation going back to the hypothetical, and where I shot and killed Ms. Hamilton, okay?

A Okay.

Q In the example that I gave a while ago, that I am found guilty of capital murder, now, reasonable expectation that the death of the deceased would occur. Okay, at the second phase, you have to look at what is there. In a situation could you, viewing the evidence and I'm not asking you for a commitment, but could you, in using that hypothet, just as an example, but could you arrive at an answer whether or not there was a reasonable expectation that the death of the deceased would occur, based upon – just upon the evidence that you saw and the facts that you heard in this phase?

A You want me to answer?

Q Could you?

A Yes, from the evidence.

Q Okay, so you would look at the evidence and you would be able to answer?

[p. 569] A Yes.

Q And be it whether or not it was a reasonable expectation of what I did, would end in the death of the individual?

A Right.

Q Going into special issue number two, we get into another aspect, another word that is not going to be defined and we are going to be looking at the probability. Now, probability is not defined. Likely, more than likely, possible. It doesn't mean absolutely. Would you agree with that?

A I agree.

Q Okay, now, when we get – how would you define probability, sir, or do you have any definition?

A Well, I don't have one right off the –

Q Remember what the Judge told you about criminal acts of violence, they could be as little as criminal mischief an act of violence toward property. I went out and slashed somebody's tires at a parking lot. Took a knife out and went across this table or across the bannister, and intentionally acted to damage or destroy. If I came up and I touched this lady's hair. The mere touching of her [p. 570] if she felt that it was offensive, and I

did it and she didn't want me to touch her. That is an assault. That is a criminal act of violence. All the way up to if I slugged the gentleman here. I hit him. Shot him. Or we are getting back into robbery, rape, murder, capital murder, okay?

A Okay.

Q During the second phase of the trial this is where that evidence which the Court feels relevant – is it admissible to come in and help you answer special issue number two. Okay?

A Okay.

Q Whether there is a probability. Whether there is that probability. Now, my looking at my actions in the case in chief in a hypothetical situation that gives you some insight into what type of person I am or does it or does it for you in that particular hypothetical?

A Yes.

Q Okay, now, whether or not I would commit criminal acts of violence. Now, what is admissible in this stage. Prior record, if any of the man in the hypothetical I was going [p. 571] into. Other criminal acts of violence, if any, that I might have committed, or reputation witnesses. Okay, and then to answer that question whether or not that probability exists whether I would commit those criminal acts of violence that would constitute a continuing threat to society. Okay. Not an absolute thing, that it is absolutely certain, but is it likely that I am going to do it based upon what I have done. Now, one of those aspects would you agree with me that although you might not look at it, but as an aspect in this sentence is

life or death. Two yesses mean death, okay. One no means life. When we are looking at that aspect, would you agree with me that people that are in prison, confined in prison, are part of our society, too?

A Yes, I agree.

Q So when that aspect of taking society as a – in totality, the people are out here that are not confined and the people that are confined in a prison or jail are also a part of society, and the guards that work there or the police officers that work there. [p. 572] Whether or not – so when you are looking at special issue number two, whether those probabilities of criminal acts of violence not only to somebody that is outside free, but that same person in my case in a hypothetical there – would I be a threat to those types of people, to the guards, to the other prisoners. This should be considered. Do you have a problem with that?

A No, I don't.

Q Okay now, special issue number three comes up only if it is raised by the evidence. It doesn't excuse the fact that a capital murder was committed. You understand that, sir?

A Yes.

Q Now, special issue number three is whether the conduct of the defendant in that case in a hypothetical, whether my conduct, what I did, okay, in that type of the killing of Ms. Hamilton was unreasonable in response to any provocation, if there was any, okay?

A Yes.

Q And she was the deceased. The question that you – would you have an open mind to look at the facts if that was there and you would have [p. 573] to look at, once again, going back to the original fact situation, okay?

A Okay.

Q Special issue number two is going into a probability, looking at that, plus some other things, special issue number one, based upon the facts, special issue number three on that. Let's change the fact situation around a little bit. Say that you know the Judge gave you an example, remember the liquor store thing. That is one extreme where it is easy to see that, say, I was going out the door, I was already out the door, I had pulled the gun, but I had the gun stuck in my pants and I said I have got a gun and showed it. Okay, and she gives me the money. I didn't even pull it, and I go out the door and I am at the door and she picks up a gun and she shoots me in th back, and I hit the ground and I turn and she shoots me and I start getting up and she shoots me in the leg. I grab that gun and I see she is fixing to shoot me again, and I shoot. I'm still guilty of capital murder. I killed her. But then, you are judging on what my provocation was, what she did before I killed [p. 574] her. Okay?

A Yes.

Q And what I did in response to what she did, if anything, was unreasonable, okay?

A Okay.

Q I can't have self defense because I can't claim that. Okay?

A Okay.

Q Now, you can go the other way. We are just standing there and anything in between, okay? Just because what in essence, they are saying is if you believe that was what I did in killing her was unreasonable, you can answer yes. If the State has proved it beyond a reasonable doubt, that is yes. Then I take – you answer yes here. Yes here and yes here. Would the fact, knowing that those yes answers would result in the death penalty give you any problem, sir?

A No, it would not.

Q Even if I was 17 years old?

A No, it would not.

Q Do your realize in the definition of robbery, that that means in the course of committing theft, I don't even have to get any money. [p. 575] The mere fact I pulled the gun is enough. If I get some, that is something, or if I try to get it and I commit it. Sir, is there anything in your mind that you would like to ask me about that I haven't asked you or something that is unclear, in response to something we have discussed?

A No.

THE COURT: Anything else, Mr. Hobbs?

MR. HOBBS: No, Your Honor.

THE COURT: Mr. Graham, now Mr. Thornton, the defense attorney will ask you some questions. Mr. Thornton?

MR. THORNTON: Thank you, Your Honor.

[p. 576] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q Before I question the juror, may I approach the bench a second?

THE COURT: Yes, sir.

(At this time a discussion off the record.)

Q Mr. Graham, I am going to move over a little bit so we can see each other a little bit. My name is Chester Thornton. And I am a defense attorney, and this is Ron Mock, who is counsel in this case, and we represent Gary Graham, the defendant in this case. At this time, may I have the opportunity to ask you certain questions and my questions at times might appear personal, because they are personal, and they are direct. The reason that we are allowed to ask personal questions is so we can understand the individual who has the responsibility of determining whether or not somebody shall live or die. You would agree with me that is a very serious predicament that you face and the [sic] we all face at this time?

[p. 577] A Yes, I do.

Q Okay, so, my questions aren't meant to embarrass you but only to get your personal beliefs on certain issues. Okay. I am of the opinion that my beliefs are my beliefs, and I hold those beliefs regardless of what other individuals think of my beliefs, and regardless of whether or not they might not agree with them, if they are my beliefs I hold true to that, and what I am asking you to do is just expose yourself in a sense and be truthful in your answers to me. Okay. I know you have been in Harris County approximately 13 years. How did you happen to

get in Harris County from Florida? Was it a transition move?

A My dad got laid off at the Cape and he got a job out here at Nasa.

Q You are a mechanic helper at the Wittingham Company, is that correct?

A Yes.

Q What is your job, what do you do?

A The job, it is repairing pumps and compressors for the chemical companies around the area.

Q And how many employees is, say are at the [p. 578] main pumping, is that a large company or a small company?

A I think about 60. Fifty or sixty persons.

Q Do you all have the employees say work out of the same building, aside from the management, the employees?

A Yes.

Q You work in the same building?

A Yes.

Q Okay, and what hours do you work?

A I work a rotating shift and I work this week from 4:30 until 12:30.

A Oh there are various shifts at the place?

A Yes.

Q On your shift on any particular night how many employees would you say are working, 20 or 30?

A Not that many.

Q Approximately how many?

A I would say about 15, if everybody is there.

Q Okay, do you work, let's say a ratio of people, not sort of – do you work with Mexicans and Blacks and other nationalities?

A Yes sir, I have worked with them.

Q And you have been there approximately two years?

[p. 579] A Three years and a couple of months.

Q What position did you start off with?

A Clean up.

Q Clean up, and did you apply for the mechanics helper or did you say –

A I got promoted.

Q You got promoted into it?

A Yes.

Q Do you enjoy your work?

A Yes.

Q Is the job, is it a job to you?

A Yes.

Q You went to San Jack College and you studied science, right?

A Well, yes sir.

Q Okay, how did you develop an interest in Science or what is your interest in Science?

A Well, I started out basically starting, I got into Science from high school. That was – I was taking it.

Q Was that because you were in Florida and the water is all so blue?

A That is one of the reasons.

Q You won't find that here, not if you go to Galveston. You say that nobody in your family [p. 580] has been a victim of a crime. You have never been a victim of a crime?

A Not myself.

Q What are your feelings, say, on the crime situation in Harris County and in the nation in general? What is your feelings on that? Have you thought about it a lot?

A Oh, it is pretty bad.

Q In the sense that – and how did you, say, form your opinion, maybe the newspaper, news media, what you see or read on the television?

A Basically, what I read and hear on T.V. and see on T.V.

Q Okay, do you enjoye [sic] any type of hobbies? Do you do anything when you get off work?

A Skin diving, camping, stuff like that.

Q You get away on the weekends and things like that?

A Whenever I can.

Q Do you travel with a group of fellow boyfriends or girlfriends?

A A group of people.

Q Have you ran down the rapids at, say, Braunsfeld?

A I have done that a bunch of times.

[p. 581] Q By your answers to your information on whether or not you served on the jury, you answered no, right, no criminal or civil jury?

A Right.

Q And you have never, say, nobody has been a victim of a crime, this whole experience is rather new to you, would you say?

A It is new.

Q What was your first reaction, say, when you received your notice to appear in Court? What was your first reaction to that?

A Oh, it personally didn't bother me, but after fighting the traffic this morning, it got on my nerves a little bit. I didn't like the Houston traffic.

Q Did you ever think at any time you might be called to serve for a jury?

A Yes, I have.

Q What was your first reaction, say, when you found out the type of case you would be considered as a juror on was a capital murder case?

A You mean this morning?

Q Yes. What was your reaction?

A Kind of shocked and surprised.

[p. 582] Q And that shock or that surprise, was it because of the type of crime it was or did you, say, expect, say, something different?

A I expected something different.

Q And what did you expect differently, a lesser serious crime?

A Yes.

Q Okay, did you hope that you could be selected to a lesser serious crime?

A Sort of, yes and no.

Q Let me ask this question, first. Did you expect when you received your notice to appear in Court that you might be called down to say, sit on a capital murder case?

A No, I did not.

Q Did you ever consider that?

A No.

Q Were you in any way, say, apprehensive when you found out that you would have to sit on a capital murder case?

A No, I wasn't.

Q Mr. Graham, tell me what your feelings and views on capital punishment, and when I say capital

punishment, I am saying the decision that you would have to make, along with other [p. 583] jurors, if you were selected, the decision that, say, me as an individual, Dennis Graham, would have to one day sit down and determine or make a decision on whether somebody should live or die, how do you weigh that in your mind?

A Well, the way I feel, if it is really a serious crime in which it needs capital punishment, I would, after hearing the evidence and everything, I would make up my mind.

Q Okay, did you ever form a view on capital punishment before you came down here you, say, had taken a view on capital punishment before you came down here, right, on the death penalty when somebody was receiving the death penalty?

A What do you mean?

Q Had you made up your mind one way or the other, were you for or against the death penalty before you came down here?

A Yes, I made up my mind, basically, it involves in what the crime is about.

Q And when you say you had decided that you were in favor of the death penalty, if I'm assuming [p. 584] that you have decided that, you were in favor, right, about your answer from the Judge, did you have any moral or conscientious scruples against it and you said that you did not?

A I'm in favor of the death penalty, yes.

Q When you formulated that opinion, had you considered or have you ever considered a situation where you would have to make that decision, not just thinking on it on the abstract, but thinking about it from the decision that if I had ever had to make that decision or if I was ever placed in a position where I would have to make that decision, do you follow what I am saying?

A I know what you are saying.

Q Can you answer that?

MR. HOBBS: I would object to that question as placing – calling for a conclusion based upon something –

MR. MOCK: Purely subjective.

THE COURT: Overruled. Restate your question, please, Mr. Thornton.

Q Mr. Graham, you have formulated an opinion on capital punishment or the death penalty before you came to Court today, right, you had [p. 585] already formed an opinion, right?

A Yes.

Q And by your answers to the Judge when he asked you if you had any moral or religious scruples against it, you answered no, you didn't. So I would assume that you were in favor of the death penalty before you came to Court today, am I right?

A You are right.

Q Okay, if formulating your opinion on whether or not or whether you were in favor of the death penalty, did you ever look at it from the standpoint of me, Dennis

Graham, having to sit in the jury box to actually make a decision on whether somebody shall live or die or did you look at it from the prospective of me, Dennis Graham, sittin [sic] at home reading the newspaper and reading about a very heinous crime and saying yes, that guy ought to get it?

A Well, it is really both ways. I thought about sitting over there and making a decision.

Q Okay?

A But, like I said, it depends on what the case was.

[p. 586] Q You would like or you would have to listen to the facts and the evidence in a particular case before you could, say, make a decision?

A Right, I would have to listen to it.

Q Have you ever had the opportunity of, say, maybe sitting at home watching either television or reading the newspaper and just run across a very heinous crime, say, a mass murder where all the victims had their heads decapitated and all portions of their body was strewn over everywhere, have you ever had to sit down and if you saw that on T.V., and say, I think that person ought to get it?

A Yes, I have.

Q Okay, did you do that or looking at it now, did you do that with the understanding that there might be possible mitigations, mitigating factors and I say mitigating factors, I mean factors that might lessen your decision to give life or death, okay, did you ever consider that and what I am asking you is, is your belief on the death

penalty and whether somebody should live or die, purely emotional position? Does it come within just because of the nature of the crime [p. 587] or does it come in because maybe you think that it is a deterrent to crime, it will prevent somebody else from doing this?

A Well, it goes both ways.

Q Explain that a little bit more, explain your feelings both ways?

A As a deterrent to crime, I figure yes, we would have the death penalty, and as to the other way around, as far as emotions, it would play a part.

Q Okay, have you ever held the opinion that the death penalty is a deterrent to crime?

A Yes.

Q Have you ever had that view?

A In more severe cases, yes.

Q In more severe cases. Do you believe that some murders are more sever [sic] than other murders?

A Yes, I do.

Q Do you feel that – strike that. The Judge has taken some time to explain to you and the prosecution has taken some time to explain to you the special issues we have on the board. Special issue number one, two and three. Did you understand those fully? Did you understand those fully?

[p. 588] A Yes, I understand them.

Q Did you understand the rational behind those issues?

A Yes, I do.

Q Did you know that previously the Supreme Court of the United States has struck down the death penalty and at one time the death penalty was in effect, and then it was not and now it is in effect again?

A Yes, I do.

Q And that the reasoning and if I fall out of line on the reasons, Your Honor, please correct me. On the issues of yes, we have the issues is to give potential jurors some direction in making a decision on whether somebody should live or die. Do you understand that?

A I understand that.

Q That you won't be making in the jury box and having found beyond a reasonable doubt that a person did commit murder, you wouldn't be making in the jury box, giving a slip of paper to write life or death on there. For whatever reason why you wanted to just live or die. It is not like that.

[p. 589] A Yes, I know.

Q And the reason we have certain issues is to give each individual juror and the jurors as a whole some directions on how they should make that decision, okay?

A All right.

Q Does the fact that the law requires you, through the issues, to make a decision on life or death, does that in any way bother you, that the law designs the issues involved, that you have to look at those things?

A No, that won't bother me.

Q If emotion is involved in your decision, that is fine, okay, but if it requires you that you have to look at those things and answer each of those issues, does that cause you any problem?

A No, it doesn't.

Q When you formulated your decision and your opinion on the death penalty prior to coming here in Court today, had you considered whether or not a person would be a continuing threat to society when you, say, if you had to make that decision, was that one of your considerations?

[p. 590] A No, not really.

Q Okay, when you formulated your decision on the death penalty, what things besides the nature of the crime would you consider or would you like to consider before you made the decision of life or death? Let's take it out. The crime has been committed. It is a murder. We know that. Okay. Would that be all you need before you can make a decision of life or death?

MR. HOBBS: Objection, Your Honor, as an improper question, phrased the way it is.

THE COURT: Overruled.

Q Would you like me to repeat it?

A Yes.

MR. THORNTON: Your Honor, I would like the court reporter to read back that last question.

THE COURT: I will restate it. The question, Mr. Graham, is this. Would the fact of the crime be the only

thing that you would consider in whether or not to assess the death penalty or would you consider something other than the facts of the crime, itself, in [p. 591] determining the death penalty?

A It would have to be other facts.

Q Beg your pardon?

A Other facts.

Q The facts of the case?

A Yes, the facts of the case.

Q That would be the basis or that is what you would use as a criteria that you would use to determine life or death, the facts of the case?

A Yes.

Q Okay, when you are saying the facts of the case, are you saying what happened on that particular date when the State has to prove that on May 13, 1981, the defendant, Gary Graham, committed murder in the course of committing a theft, is that what you are saying, you would have to know before you could reach a decision in the case, what happened on that day?

A Yes, that is true.

Q Is that all you would have to know, what happened on that day?

A The reason behind it and stuff.

Q I beg your pardon.

[p. 592] A The reason behind it.

Q The reason behind it, okay, anything else?

A Well, it could have been an accidental shooting or something.

Q Okay, anything else?

A No.

Q Okay, remember, I took you back and asked you have you ever been in a situation where you read in the newspaper or T.V. and you read about a crime and I asked you if you ever had to make the decision, look at it from the prospective, if I had to make the decision to give them life or death, right?

A Right.

Q Would you say your belief, then, prior to you coming to trial on the death penalty and how you would decide on giving a person life or death, would you say your beliefs are the same as they were then as they are now?

A Yes, they are.

Q Okay, and that the facts of the case and what happened would be what you would require on making the decision of life and death, am I right?

A Right.

[p. 593] Q The facts of the case, what happened, what was the reason behind it, am I right?

A Right.

Q Did you understand fully the special issue number one, two and three as explained to you by the Judge?

A Yes, I did.

Q And did you understand fully special issues number one, two and three as explained to you by the prosecution?

A Yes, I did.

Q Okay, sir.

MR. THORNTON: Your Honor, at this time I would like to challenge this juror for cause.

THE COURT: Mr. Graham, we have spoken with you at length about these special issues that you would have to answer on the punishment phase of the trial. We talked about special issue number one, at least with regard to deliberately and reasonable expectation. And we also spoke with you at length about the fact that the State must prove to you beyond a reasonable doubt that you should answer these special issues yes. We also spoke with [p. 594] you about the fact that there may be other testimony that you might hear with regard to the issue number two as to whether or not the defendant would probably commit criminal acts of violence that would constitute a continuing threat to society. You, in my speaking with you, told me that you would not automatically vote for the death penalty just on the facts of the crime, but that you would require the State to carry its burden on these other special issues with regard to whether or not the defendant had any prior criminal record and committed other criminal acts, that your decision would not he [sic] automatically, is that what you are telling me is the case, sir, that you would require the State to present other testimony or other evidence to convince

you beyond a reasonable doubt that you should answer these special issues yes?

A That is what I am saying.

THE COURT: So I want to make sure I understand. The fact, the mere fact you have found someone guilty of capital murder, that in itself, are you going to automatically vote for the death penalty regardless of the [p. 595] situation?

A No, I am not.

THE COURT: Your challenge is denied.

MR. THORNTON: We have no further questions.

THE COURT: What says the State?

MR. HOBBS: The State will accept.

THE COURT: What says the defense, Mr. Thornton?

MR. THORNTON: The defense will accept, Your Honor.

THE COURT: All right, Mr. Graham, will you raise your hand and be sworn as a juror, please sir.

(At this time juror sworn as a juror.)

THE COURT: All right, Mr. Graham, this will complete your service at this time. We anticipate that the jury selection process will take a total of approximately two weeks, this week and the next week. We anticipate the testimony will start on approximately the 26th of October, and will last approximately a week. We anticipate the total trial will take about a week to take place.

You are free [p. 596] to go to your work, where ever you are going to be, and we will notify you in advance as to when the trial is going to begin. My courtroom is on the fourth floor in this building, and that is where this trial will be held. We have phone numbers as to where you can be reached, and we have a home phone number for you. Do you have a business phone number?

A Yes.

THE COURT: What is that number?

A 471-654 [sic].

THE COURT: And your home number is here?

A Yes.

THE COURT: All right sir, If any of these numbers change or if you need to contact us, you may contact Mr. Pollinger, who will be in charge of the jury in this proceeding. As I have stated, we will contact you hopefully two or three days, the middle of next week to assure you we will be beginning on Monday the 26th and let you have advance notice. Do you need any written verification for your employer to show you have been down [p. 597] here?

A No.

THE COURT: We will be in contact with you. Thank you. You are excused.

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[p. 757] MS. MEREDITH MONTAGUE, called as a prospective juror,-after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Ms. Montague, you are unique in that you are the only woman that I have come in contact with who both husband and wife are physicians other than my wife's sister and her husband. She's a gynecologist and he is a pediatrician, so it is a unique combination.

Ms. Montague, it's been a day since we spoke about principles applying to a criminal case, and I want to talk to you briefly before we begin our discussions today. I know from your juror information form that you had prior civil service, so I'm sure you are familiar to an extent with the trial of a case. Possibly, you are not familiar with the trial of a criminal case. We discussed many principles that apply in the trial of a criminal case. Presumption of innocence, burden of proof, the fact that the indictment is no evidence of guilt, the right of the defendant to remain silent or the Defense to present no testimony. [p. 758] The fact that we have a bifurcated or two step trial system in Texas. These are all things I have discussed with you. Did any of the topics that I discussed yesterday present any problems to you as far as your understanding as to what they meant and your ability to follow those concepts, if I instructed you as to these concepts?

Q No, Your Honor.

Q By virtue of the fact that this is a capital murder case, it entails, as I told you yesterday, the allegations that a person's life was taken while the accused was in the course of committing another felony offense. And in this particular case, the defendant, Gary Graham, as I told you yesterday, is accused of taking the life of Bobby Grant Lambert while Mr. Graham was in the course of committing robbery. By virtue of the fact that it is a capital murder case, it presents the twelve persons that will serve as jurors in this case with the dilemma of examining their feelings with regard to the death penalty as a possibility for punishment. Once again, this is the only situation in which a jury can contemplate taking [p. 759] another person's life as punishment, but it is incumbent upon all of us to speak with you about your feelings about the death penalty and that is why I told you yesterday that you give it some thought prior to our speaking to you individually. We are not in any way attempting to pry into your personal feelings, but it is obvious that we need to know your feelings with regard to the death penalty. Obviously, as a physician, you have a great regard for human life, but our law requires that I ask you if you have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment in a case that you determine proper.

A No, I have no scruples.

Q I take it, then, what you are telling me – would you feel more comfortable if I said Doctor Montague?

A It doesn't matter.

Q That if you were to serve on the jury in this or any other capital murder case, if the State proved to you

beyond a reasonable doubt that the defendant should be found guilty, you could vote guilty, knowing full well the dilemma that [p. 760] your verdict would create for you on the punishment phase of the trial? As I said yesterday, in the punishment phase of a capital murder case, the jury has only two possible answers on the punishment phase. Those answers mandate the Court to assess punishment at either life in the Texas Department of Corrections or death by lethal injection. I do not have the discretion to alter or reverse the jury's verdict. If the jury answers two special issues that are submitted to them yes, the assessment of punishment would be death by lethal injection. I cannot contravene that verdict and say I believe the punishment should be life. And the reverse is true also. The jury communicates its wishes to the Court as to what the proper punishment should be assessed by the way they answer at least two special issues that are included in the Court's charge.

By virtue of your prior jury service on the civil case, I know you are familiar with the concept of special issues. As I have stated, they are included in the Court's charge. One of the two special issues deals with the Court directing that you review once again the [p. 761] defendant's conduct to answer a special issue. The specific special issue deals with the Court asking you to consider certain items of evidence and make a decision as to whether or not the defendant will probably commit future acts of violence that will constitute a continuing threat to society. The State has the burden of proof on the punishment phase of proving to you beyond a reasonable doubt if it is seeking the death penalty, that the answer to those special issues should be yes. And an array of yes answers –

by the unanimous verdict, once again, results in the punishment being assessed at death. A no answer to one or more or all special issues results in the punishment of life imprisonment. The State has the burden of proof, as I said, of beyond a reasonable doubt on both phases of the trial. What we are looking for in the persons who are chosen as jurors in this case are twelve people who will not be predisposed as to how they would answer those special issues. We cannot have twelve people who automatically vote for the death penalty merely because the taking of another human being's life is involved. [p. 762] Obviously, there are many murder cases that are presented in this Courthouse that do not have the alternative of death, the death penalty as the type of punishment. That because of the second felony situation that we have talked about involving the taking of a life of another human being, that creates the capital murder situation, and thereby creates the situation of death.

In every phase of a capital murder case, the jury will have to consider at least two special issues. There are always two, at least, and no more than three. There is a possibility that three special issues will be submitted to the jury. I would like to call your attention to the cardboards that are attached to the board and ask you to read special issues number one and number two, and then we will discuss them a little further.

In special issue number one we are obviously asking you to re-examine the conduct of the defendant that resulted in the death of the deceased in asking you two specific questions with regard to that conduct. One was the conduct of the defendant that resulted in the [p. 763]

death of the deceased done deliberately and in committing that conduct, did the defendant reasonably expect the death of the deceased would occur. I will not give you any legal definitions as to those terms. It is a matter of your using your common sense or what definitions you consider to be proper in analyzing this special issue. In my mind, the word deliberately means it is a person's intention or his conscious objective to commit that act. It is not necessarily equated with premeditation, but it is a voluntary act on that person's part. You may have a different definition that you go by. This is the way I construe deliberately in my mind.

And in viewing the defendant's conduct, did he reasonably expect that the death of the person he killed would occur. Once again, we are requiring that the persons who serve on this jury examine the evidence that has been presented to them before they answer any of these special issues. We are not people who have knee jerk response based on the fact that they have convicted a person of capital murder. In special issue number one, [p. 764] I think if we consider two hypothetical situations, it may draw a distinction for you as to how you may answer special issue number one. Assume with me that a person walks into a Utotem intending to rob the clerk at the Utotem Store, but not intending to harm anyone, and in walking into the store, the person takes the pistol and he does not intend to use the pistol other than as a means of force to take money, not to take a human life. As he walks into the store, he slips because there has been water left on the floor by the door that he did not see. As he slips, his feet fly out from beneath him, and the gun

leaves his hand and the gun leaves the hand and discharges and a bullet is discharged and hits the clerk in the chest and kills him. That's on the one hand. On the other hand, we have the same robber walking into the store, taking the money and guns down the clerk in cold-blood. In comparing the conduct of the defendant or the robbers in those two situations, your analysis as to how you might answer special issue number one may differ. In viewing the accidental discharge situation, you very well may say that [p. 765] even though that robber deliberately intended to go into the store and take the money, he did not deliberately intend to take, nor could he have reasonably expected if he was going to take the life of a store clerk. On the contrary, the hypothetical situation where the clerk is slain in cold-blood, you might view that conduct and say he acted deliberately and reasonably expected to take the clerk's life. There are varying situations that would require possible different answers by the jury. Do you agree with me, Ma'am, that in viewing special issue number one, you will examine the testimony that has been offered and not automatically answer these special issues because you have found the defendant guilty?

A Yes.

Q The second special issue requires that the jury, as effectively as possible, predict the future of the defendant. We are asking you whether or not there is a probability, is it more likely than not, that this person will commit criminal acts of violence in the future that would constitute a continuing threat to society. I will not give you a restriction in saying that [p. 766] you can only consider those acts if the person were walking the streets

of Houston, Texas. You very well might consider his acts if he was in the penitentiary as being a threat to other inmates or prison guards. Obviously that is part of society, also. But you obviously could consider the facts that were presented to you on the guilt or innocence phase of the trial in which you have found him guilty. You also may consider prior record, if any, other criminal offenses, if any, and reputation testimony, if any, as to what type of a person this is. On the contrary, the person may not have any prior criminal record. He may not have any other criminal offenses, and he may be a son of a minister, a person whom everyone agrees is a very good human being except for this one offense. So once again, we are asking that you have an open mind and not answer either special issue yes or no until all the testimony is presented. Could you do that?

A Yes.

Q You understand once again I will not be able to provide you with a definition of probability. [p.767] In my mind, probability means it is more likely than not to occur. It is not a certainty. The State of Texas could not prove to you beyond any doubt that it is a certainty that he will commit criminal acts of violence, but their burden is to prove to you beyond a reasonable doubt that he probably would commit criminal acts of violence. There will be no definition as to what criminal acts of violence is composed of. In our law, there is a broad spectrum, ranging from a Class C misdemeanor assault, where a person touches you in a manner you find offensive, and that person is in violation of a criminal law. That ranges on the one end of the spectrum to the other end, obviously, in which capital murder finds itself. There is a

broad range in between dealing with assaultive offenses, offenses against the person in the form of rape, kidnapping, robbery, and in property offenses dealing with property destruction in the form of criminal mischief. Someone will fully destroy property you own. That is an act of violence, and in viewing this special issue, you must make the determination whether or not the defendant would constitute [p. 768] a continuing threat or ongoing threat to society. Do you have any questions with regard to the explanation that I have given you in the first two special issues?

A No, Your Honor.

Q As I have stated, there possibly will be a third special issue, and that special is only presented in the event that it is raised by the evidence on the guilt or innocence phase of the trial. That special issue deals with the possibility of the person who has been killed in some way contributing to or provoking the situation in which his death resulted. That special also is attached to the bulletin board. As you can see, it begins by saying if raised by the evidence. If it is raised by the evidence, regardless of how minimal that evidence is, if it is one sentence that raises the issue of provocation by the person who was killed, I, as a matter of law, must present that special issue to the jury. If there is not a sentential of provocation by the deceased, then I will not present that to you. But, assuming that is presented to you, it will then become necessary for you to view the conduct of the [p. 769] two persons, the defendant and the deceased. And in viewing those persons' conduct, you will have to make a decision as to whether or not the defendant, in taking the life of the deceased, acted unreasonably in response to

provocation of some sort by the deceased, if any, prior to his death. This is not meant to provide justification for the taking of that person's life. A person who is convicted of capital murder cannot claim self-defense because he has provoked the initial difficulty. In my hypothetical situation dealing with the store clerk and the robber, the robber, by virtue of his entering the store with the gun to rob that clerk has provoked the difficulty. If he shoots the clerk after the clerk has drawn a gun from his drawer, he cannot, in turn, claim self-defense, but he can present testimony as to the clerk pulling a gun and firing at him for the issue of mitigation in special issue number three for the jury's consideration as to whether or not he should live or die. It is difficult to conjure up in my mind and possibly in your mind the feeling that the person who has been killed acted unreasonably in defending [p. 770] his property. However, once again, we are not impugning any criminal responsibility to the person that was killed. We are merely saying that if he in some way provoked the difficulty in response to what the defendant did. You may consider this testimony in mitigation that it may have some effect as to your decision as to whether or not the defendant must live or die. You may, hypothetically speaking, view a situation in which, once again, the robber has walked into a store only to take money and not to take a life. He takes the money and turns to walk out the door and the store clerk, in response to the robber, pulls the gun from under the counter, shoots and hits the defendant in the back and the defendant, as he falls to the floor, turns and fires and kills the store clerk out of an act of self-preservation. As you can see, if the robber had been allowed to walk on out the door, no one

would have been hurt or killed, but the shooting was brought about by the clerk pulling the gun from under the counter. Once again, we are not condoning what the defendant has done, we are merely saying that if you feel it is proper, you may consider [p. 771] this in mitigation of punishment. Do any of the items that I have talked about, Ms. Montague, present any problems for you?

A No.

Q Okay. All right, do you feel, Ma'am, that if you are chosen as a juror in this case, that you would have an open mind with regard to these special issues and not reach a verdict until all of the testimony by both sides, if any, was completed?

A Yes, Your Honor.

Q And that it is your statement to the Court that you would not automatically vote for the death penalty based upon the facts, merely upon the fact that a person's life was taken in this case?

A I would not.

Q Ms. Montague, do you have any questions of me as far as my explanation of these terms?

A No.

Q Now, I have concluded what I wish to speak with you about. Our law requires that the attorneys for both sides have an opportunity to speak with you. Mr. Hobbs, the Assistant District Attorney will speak to you first, and Mr. Mock, [p. 772] representing the defendant, Gary Graham, will speak with you. Mr. Hobbs, you may proceed.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good morning, Doctor Montague, As the Judge told you, my name is Carl Hobbs, and I am the Assistant District Attorney assigned to prosecute this case. The first thing I must ask you is that your daughter, I believe her name is Elaine?

A Eleanor.

Q Eleanor is – will be a full-fledged prosecutor in County Court 10 very soon . The mere fact your daughter is an Assistant District Attorney, would that in any way affect your decisions in this case, Ma'am, as a fair and impartial juror?

A No.

Q Of your children, are they all girls?

A One boy.

Q Under our law an individual at the age of seventeen is considered adult responsibility under the adult laws of our State. Would the mere age or youth of a defendant cause you to [p. 773] react differently under your oath as a juror in the decision of a case if you believe the State had proved its case to you beyond a reasonable doubt?

A No, it wouldn't.

Q Now, the minor theft that you were talking about on item twenty-four, asking if you had been a victim of a crime, was that a theft from –

A From a house.

Q Okay. Very long ago, Ma'am?

A About three years ago.

Q Would that in any way affect your decision in this type of case?

A No.

Q Doctor, in discussing basically the case, the trial is divided into two phases, which I think you are aware of, but needless to say, if the State had not proved its case beyond a reasonable doubt as to the first phase, the second phase is annulled. During that first phase, the State's burden as it is in the second phase is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt, as you may have heard on television. That is a rather impossible [p. 774] burden from the standpoint you would almost have to have been present to see what had happened to remove all doubt from your mind. And if that were the case, you would be a witness and not a juror. That doesn't pose a problem for you?

A No.

Q What are those elements? Well, the State, in one thing, in that burden of proof, the Defense doesn't have to do a thing. I can't call the defendant to the stand. He doesn't have to testify. They don't have to put on any witnesses whatsoever. In that same context, the State does not, under the law, have to prove why an individual did what he or she may have done. It is proving that the event did take place beyond a reasonable doubt. What are those elements? Well it's, also in capital murder, we are going to be talking about the intentional taking of a life, in the first act, in combination with it, here we are going

to be talking about intentional taking of a life in conjunction with the robbery and the elements specifically in this case that you, as a potential juror, means that the State must prove [p. 775] that Gary Graham was, in fact, the individual that in Harris County, Texas, on or about May 13, 1981, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert, by shooting Bobby Grant Lambert with a gun. That is all the State must prove beyond a reasonable doubt as to the first phase of the trial. Do you have any problems with that concept?

A No.

Q I can't go into a person's mind and tell you what they are thinking. So in showing intent, intentional will be defined for you by the Judge as a legal term. I can show you intent by a person's words or by his actions or a combination of one or the other. Do you have any problems with that concept?

A No.

Q Now, robbery, we are going to necessarily have to prove robbery, and I would like to read the definition of what robbery is under our law. A person commits the offense if in the course of committing theft of property with intent to [p. 776] obtain or maintain control of that property, a person intentionally, or knowingly or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death, by use of a deadly weapon or serious bodily injury, it becomes aggravated robbery. Here, robbery in and of itself, I think it is in the course of

committing theft of property. The key word being in the course of. The charge that is here, that can be conduct that occurs in an attempt to commit it, during the commission of or in immediate flight after it. The offense of robbery can actually occur without any property whatsoever having been taken. If I come up to you and pull a gun on you, Doctor, and demand your money and a police officer came up behind me and stuck a gun in my back and stopped me, at that immediate time, I have actually committed the offense of aggravated robbery. No problem with that?

A No.

Q Okay, now I would like to give an example, a hypothetical for you to consider in my next question, and then let me get into the special [p. 777] issues, one, two and three. And the set of hypothetical situations I would like to give you is to imagine this room to be, let's say a Seven-Eleven Store, okay?

A Okay.

Q And that you are present in the store, in the back, and in a position similar to where you now – where Ms. Hamilton, the clerk, you can see her, you know she is there. You can see somebody maybe coming in, but maybe not as you are now, can see faces or give a good description of someone. Furthermore, besides yourself and Ms. Hamilton being present in this store, Mr. Mock is also present, and he is an area of the store similar to this jury box with an obstruction such as that rail that is here, okay.

Q He is sitting here and furthermore, besides the three of you, Mr. Thornton is also present in an area such as is here where he has the ability to see both, all three of the other people that are in the store. And I am going to be the individual, the robber. I come in and let us also, let's assume that Ms. Hamilton has just [p. 778] closed out the register. Okay?

A Okay.

Q And that she is at the end of her shift or whatever and has placed the money in a drop bag, and has a smock on and she has it sticking out partially from that smock, which I could see. And she is in that area of the store. You are where you are at. You can – you might see me or a shadow of me coming in. I approach and furthermore that she is holding some type of box in the process of restocking something. I approach Ms. Hamilton, and I start to grab for her pocket containing the drop bag. As I am doing that, she turns from me with the box. She is holding the box and she turns away from me and kind of pulls away and I am still grabbing at it. At that time, I grab hold of her with one hand and reach down and pull the pistol and bring it up towards her. At that time Mr. Mock sees the pistol and he is concentrating heavily on that pistol, not so much at me, but at that pistol. Exercising common sense and sees the pistol, he dives to the floor, doesn't get a good look at me. Mr. Thornton is out here. You can see a motion, but you don't see what is [p. 779] happening, and Mr. Thornton can see both my actions that of Ms. Hamilton, and also partially Mr. Mock over here. When I see Mr. Thornton and after I pull the gun I shoot and kill – shoot in the chest area of Ms. Hamilton and kill her, and run out and leave, okay?

A Okay.

Q I am caught later on. And I am being brought in to be tried for the offense of capital murder. Now, in the situation that is there of the three people that were in the store, the four people, Ms. Hamilton being the deceased, cannot testify. Mr. Mock didn't see me. He saw a weapon. You didn't see anything. Mr. Thornton takes the stand. He testifies and let us further presume that the State has proved its case to you beyond a reasonable doubt as to every element. We are looking at the element of whether or not I am the one that committed the offense. Furthermore, let us assume that they didn't get my gun. They didn't get anything that I may have taken, if I took anything, and I didn't leave any fingerprints, okay?

A Okay.

Q Mr. Thornton takes the stand. Now, I am going [p. 780] to take you out of the situation and put you in as a juror, okay?

A Okay.

Q Mr. Thornton testifies under oath and he testifies that Carl Hobbs is the person that shot and killed Ms. Hamilton on the day in question in Harris County, Texas, and all of the other elements. Could you, as a juror, if you believed beyond a reasonable doubt the State had proved each and every element, and furthermore, you believed the testimony of Mr. Thornton, could you base a conviction on the testimony of a single eyewitness?

A Yes.

Q Okay. Thank you. Now, let us presume that I had been found guilty now of the offense of capital murder

for the purposes of the discussion of the special issues, in using the example that I have given.

Special issue number one, the Judge has read to you, and that being whether or not the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased would result. The term [p. 781] deliberately, do you have – what is your definition of deliberately?

A I think an action that is taken with thought, and with certainty on the part of an individual.

Q Webster has defined it as willful or voluntary. Do you have a problem with that?

A No.

Q The concept of, you don't equate it with premeditation, or do you?

A No.

Q One's actions can be deliberate based upon little or no thought?

A Yes.

Q Now, with reasonable expectation that the death of the deceased would result as just a given factor, the mere wording of the way special issue number one is phrased requires one as a juror to examine the facts and circumstances of the offense, itself, in order that it can be answered at all and those facts and circumstances to make that distinction. In the situation and the example that I have given for you to consider there, would you

have a problem in answering that question in that type of [p. 782] hypothetical situation?

A No, sir.

Q Now, of course, there are going to be variations as to the set of facts that you hear in a given case, but using a judgment as you, as a juror and as a collective body as a jury, to decide these issues, if you believe beyond a reasonable doubt that the State had proved that that answer should be yes, could you so find and vote yes?

A Yes, sir.

Q Now, as to special issue number two, let me move down to it?

A Okay.

Q The issue, by its wording, and by its content, necessarily requires the consideration not only of the offense, itself, and the actions of the defendant and the parties involved, but also other evidence that the Court may determine relevant for the jury to hear as to this individual's probability of committing future acts of criminal violence that will constitute a continuing threat to society. That can be prior record, if any, other acts of criminal violence, if any, reputation as a possibility, [p. 783] one more or maybe none, but that is the facts that will unfold. Probability. Once again, not defined. Not absolutely. Not positively. Probability. Do you have a definition that readily comes to mind as far as you are concerned as to what probability is?

A It is something that cannot be stated in a statistical fence. For me, probability means that there is something between fifty percent and one hundred percent, possibility that it would occur.

Q Anything further that you would consider? Would you necessarily equate probability with being likely or more than likely or possible?

A Yes, possible.

Q Needless to say we are judging on a present criterion with what evidence may be presented to you as a juror to answer that question. Once again, if you believe beyond a reasonable doubt, through the evidence that was presented to you, the State had proved that special issue number two should be answered yes, could you vote yes, knowing that if there were special issue number one and number two were the only special issues submitted that that finding, that voting [p. 784] of yes on both of those issues, along with the other eleven members of the jury, would result in the death penalty being imposed by the Court?

A I could.

Q Regardless of the age of the individual being considered?

A Yes.

Q - Okay, now, needless to say, society, as the Judge said, takes in using in a very broad sense and do you have any quarrel with the concept that those individuals that are through our laws have been confined in the penal institutions and those that take care of them there, whether they be deputy sheriffs or prison guards or what

have you, are part of that society, and could you take that into consideration in making your determination of whether or not those criminal acts of violence could or would be directed toward those individuals as part of our society?

A Yes, sir.

Q Okay, now, criminal acts of violence. Do you have any problems with that concept?

A No.

[p. 785] Q In looking at what type of acts, not exactly a shoplifting, Ma'am, but Doctor, from the standpoint, you, as an individual, making a decision such as this, that you may be required to make, would you keep an open mind and look at that evidence? What type of things would you like to view if you had a choice of what you could view concerning special issue number two, what type of evidence either way?

A With regard to the individual reputation.

Q Thank you, Ma'am.

A Whether or not he was engaging in criminal acts prior to or during a particular phase in his life, and more, of course, than hearsay, one would expect to have as factual testimony as possible. I am not too sure that I understand what comes under the language term as criminal acts of violence. I think that I would need some information with regard to what is criminal in an individual's past and what isn't. I know the obvious ones, but I am sure that there are other technical factions that I am not aware of.

Q Criminal acts of violence can be as little as destroying property, all the way up to murder, [p. 786] robbery, rape.

A The major ones I think I know.

Q Now, special issue number three, and I'm about out of time. That is only if the evidence raises it. Now, in the situation that we are talking about, I think the key word is whether or not – it's reasonable – actions, is it – what, if anything, did the person that was killed do. Was it provocation? That's the first thing you have to decide in your mind, whether it was or it wasn't, and the, whether that provocation, in response to it, was reasonable. If it was unreasonable, it should be answered yes, and if was not reasonable, it was in fact, reasonable, it should be answered no. Do you have any problem with that?

A No.

THE COURT: Anything further Mr. Hobbs?

MR. HOBBS: We pass, Your Honor.

[p. 787] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court, Your Honor. Doctor Montague, what is your medical specialty?

A I'm in cancer treatment, with treatment of radiation.

Q Okay, now, I would take it that you don't have a private practice but that you practice through the hospital?

A Yes, that is right.

Q Do you have any way of determining what percentage of your patient load is terminal verses non-terminal?

A I think about forty percent can be considered uncontrolled. They might not be terminal, but there is uncontrolled tumor or cancer, but sixty percent are to be treated for the cancer.

Q You know, if – I always go to my doctor's office and I always say if I have a doctor in my office today, you are such a nice person, I can't do it to you anyway. How long have you been practicing medicine?

A Since 1953, but then I went to a resident's training program after medical school.

[p. 788] Q And how long have you lived in Houston?

A Since 1958.

Q How long have you lived on Yarwell?

A Since 1961.

Q What part of town is that in?

A In the southwest area, the Meyerland area.

Q Now, you have also indicated that your daughter and by Mr. Hobb's good research, is going to be working in County Court Number 10. She will be a full-time member of the staff of the D.A.'s Office.

A If she passes her bar exam, yes.

Q She's currently working now as an intern, I understand?

A That is right.

Q Her name is?

A The same, Eleanor Montague.

Q Okay, now, because she is now working with the District Attorney's Office and may possibly be a full-time employee of that staff, does that give you any kind of kindred spirit to the D.A.'s Office?

A That was the first thought that I had when I received the juror's notice, and I thought about it quite a bit. I think not, in answer to your [p. 789] question.

Q Now, I can appreciate your ability to say you think not, but at this stage of the game, we are just about at absolutes, Ma'am, where we have to have a positive answer that it would not really affect you.

A It would not.

Q And if you listen to the evidence and made a determination in your mind that Gary Graham was not guilty of the offense of capital murder, you could find him not guilty and not have to go home to your daughter with your head down?

A Oh, yes sir.

Q What is your husband's medical specialty?

A He is an internist.

Q He is in private practice?

A Yes, he is.

Q Now, you also indicated you are a New Yorker. How long did you live in New York, if at all?

A I lived in New York off and on for a total of five years.

Q Do you have any experiences as relates to New York City that relates to crime that may have stayed with you?

A I loved the city. I didn't have. No, sir. Not [p. 790] at all, because I love the city. If I didn't have children, I would live there.

Q Did you go to graduate school at the University of Alabama?

A No, that was undergraduate.

Q Where did you go?

A Medical school was in Philadelphia.

Q What school?

A Medical College of Pennsylvania.

Q And I noticed also you have indicated your religious preference as Unitarian. Which church do you attend?

A First Unitarian on South Main Street.

Q Is that the one on Main?

A It is between Main and Fannin.

Q On Southmore on the corner?

A Yes, on the corner.

Q The one with the chanting players?

A Yes, chanting players.

Q Now, other than the burglaries you have had at your house, have you been a victim of any other crimes?

A No, sir.

Q Has anyone in your immediate family or close associates to you been any victim of any [p. 791] violent crime to your knowledge?

A Several neighbors have had their homes broken into, but they were, what is it, burglarized, it was nothing else.

Q Now, we are talking about in this instance, Doctor Montague, the most serious offense on the statutes of the Texas Penal Code. It is capital murder. It means taking the life of somebody while you are doing some other act, be it robbery, kidnapping, rape, and arson. Is there anything about that fact that we are talking about capital murder that is so repugnant to you that you wouldn't be able to sit and be a fair and impartial juror and not be able to listen to the evidence of this kind of case?

A No, sir.

Q Also in these types of cases, this in the only situation where a defendant cannot waive or give up his right to a jury. We are mandated in this proceeding by the Code of Criminal Procedure, which tells us that we have a two trial system in the State of Texas, the guilt or

innocence and if you get past that phase, then you go to the punishment phase. You wouldn't hold it against the defendant, would you, Ma'am that we [p. 792] are talking about punishment now so much, are you, in thinking that we might be looking ahead to the punishment phase of the trial and get completely past the guilt or innocence phase of the trial? You realize we are only doing it because we are mandated by the Court and we are not saying Gary Graham is guilty?

A I understand.

Q You wouldn't hold that against him?

A No, sir.

Q Mr. Hobbs has also told you that the State has the burden. They must prove to you beyond a reasonable doubt each and every element of the offense as charged, that we don't have to do anything. Once they complete their testimony and put whatever testimony or witnesses, whatever it is, on the stand and rest, we can rest right behind them. We don't have to say word, and if they haven't proven to you at that point beyond a reasonable doubt that Gary Graham is guilty of the offense as charged, then you must return a verdict of not guilty. Toward that end, Gary Graham is also cloaked with a fifth amendment guarantee against self-incrimination, meaning he does not have to take the stand to testify in [p. 793] his behalf should we choose not to, and we can't tell you at this point whether we are going to, or any of our tactical decisions or anything at this point. But, the law says that if he does not testify that the jury cannot refer to, comment upon or allude to that fact nor hold it

as a circumstance against him. Could you follow that law?

A Yes.

Q Would you, Ma'am, possibly think that he must tell you his side of the story or he must be guilty?

A No.

Q Now, let's talk about, for a few minutes, the issues on the board. And you have discussed them briefly with Mr. Hobbs also, but I want to just chat with you for a second about special issue number one and how it is joined by the junction and, meaning it is a two-pronged situation, both of which must be met. Would you agree with me on that?

A Yes.

Q Can you also – strike that – would you consider an act that caused the death of someone automatically deliberately?

[p. 794] A No.

Q Can you see how someone might have formed one intent as in the Judge's hypothetical to go in to rob somebody and during the course of the robbery things change, and as an end result he may deliberately shoot somebody. Can you, Ma'am, conceive of a certain set of circumstances where one might deliberately shoot someone and not have a reasonable expectation that that person might die?

A I may have some trouble with that. He deliberately would shoot someone and expect them not to die?

Q And not have the expectation that they would die.

A Perhaps if they deliberately shot them in an area that would not be fatal.

Q Well, would you hold them, Ma'am, to the burden of knowing as you might technically, which areas of the body would be fatal, would you hold a layman to that knowledge or that burden of knowing what you would know as to what parts of the body might be fatal or not?

A I might, yes.

Q Are you telling us, then, Ma'am, that you might [p. 795] expect or you would expect a layman to know what areas of the body they might shoot in and not kill somebody?

MR. HOBBS: Objection, Your Honor, as being an improper question of this juror in relation to the issue posed.

MR. MOCK: If I may respond?

THE COURT: All right.

MR. MOCK: It's my position that in answering the question, the State still has the burden to the punishment issue to prove each and every element of the offense. I'm asking this witness or this possible juror if she would shift that burden and place a burden on the defendant, giving – requiring him to have knowledge that she might have as a professional doctor and impugn that knowledge or the burden of that knowledge to laymen.

THE COURT: Let me see if I can explain that a little further, Doctor. In viewing the conduct of the defendant, obviously you are viewing his conduct from his eyes. You cannot impugn knowledge to another person. If obviously as you stated that someone is shot in the foot or the shoulder or the arm to [p. 796] incapacitate them, but not to kill them, but it results in their death, to some unique reaction to some type of pain medicine or let's assume that the person falls to the floor after they are wounded and hits his head on the edge of the corner and is subsequently killed. You would obviously maybe possibly dealing with a certain situation as to reasonable expectation of the death, but what I would ask you is would you keep an open mind with regard to this issue and make a judgment from the facts as they are presented to you in trial?

A Yes. I think the thing that confused me a bit was the deliberate action of the individual, but could you understand where the deliberate action might not end up in the result of a fatality. I think I would certainly be able to keep an open mind.

THE COURT: Someone, very possibly, as Mr. Mock stated, chooses to enter the store to rob the store and chooses to shoot, but not to kill, nor reasonably expect to kill, and it would be just a matter of you using your personal knowledge and the law will require that you are not to consider any personal experiences, [p. 797] other than what are shown to you in trying to dissuade or persuade another juror from his or her point of view. With that instruction, your objection is sustained, Mr. Hobbs. I don't think any further discussion is necessary

on that point. You may proceed to something else, Mr. Mock.

QUESTIONS CONTINUING BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q Thank you, Your Honor. So, you are telling us, Ma'am, that you could conceive of the situation where a person could deliberately shoot somebody and not have a reasonable expectation that they not die?

A Yes.

Q Okay, let me ask you this. How would you determine, Ma'am, whether somebody did something deliberately or not in your own words?

A I would see if the actions, whatever it is, is a willful one, is one that they planned to carry out and is not accidental.

Q Would you be able to break these two – excuse me, I'm trying not to confuse you. Would you be able to break the special issue number one [p. 798] down into its two parts and look at each part to come up with the answer in the end result?

A The determinations – the determination of the death?

Q Yes Ma'am, would you do that?

A Yes, I think so.

Q Okay, that is all I can ask. Now, as to question number two, whether there is a probability that the defendant would commit criminal acts of violence that

would constitute a continuing threat to society, have you thought about those?

A Yes.

Q Have you thought about in your own mind, Ma'am, what you would like to have brought to you in order to help you make that determination?

A No, I haven't thought about it to that degree. I don't know with the exception of people who have known an individual over a long period of time or things on record, previous records, things of this sort, but aside from those two, right now, I wouldn't be able to think of any other things, other than dangerous actions and things of that sort.

Q Well now, would you automatically feel that [p. 799] because someone has committed one or more of the acts of criminal violence that they would automatically be a continuing threat to society?

A Not automatically, but I would say the chances would be greater than someone who might not have committed any acts of violence.

Q Okay, would you wait until you got to that special issue if you got that far before determining your answer to number two and analyze number two by itself, using the evidence, if any, which is presented on number two?

A Yes.

Q Before you made any decision? Would you?

A Yes.

Q Would you, Ma'am, share with me your feelings about the death penalty?

A About ten years ago I was opposed to it, and I felt rather strongly about it. I think as I got older, I began to change my mind, thinking that there are, in fact, certain crimes committed by certain people who probably ought to be punished by death – the death penalty, and I have had reversal of my mind. I certainly don't think that everybody that commits a [p. 800] violent crime or capital murder should have the death penalty, but I can see in some instances I would be in favor of it.

Q You mentioned that this feeling that you now express has evolved during a ten year period?

A I think so, yes.

Q And during this period, did you discuss your feelings with anybody or was it just something that evolved within your person?

A I think it was a personal decision on my part.

Q Well, did you study over it long or just something that kind of happened or just evolved?

A I think maybe it is the civilization and culture that we find ourselves in that probably prompted me to change my mind that there are, in fact, so many horrible things, not each from individual to individual, but from group to group that I have decided that, in fact, the death penalty may be – it's not a solution, but it may be one way to mete out punishment for certain crimes, and I can't tell you exactly when it was that I made that decision, but I have made it.

Q Yes, Ma'am. I can understand that. We are not here to hold you down to any bare specific [p. 801] statistical type date. Our real purpose is to try to get to know you in a very short period of time, to get a feel for what you feel. That is the only way we can do it, is to kind of ask you.

Question number three, if raised by the evidence, only if raised by the evidence will be a third issue to be answered. If that should happen, you would have three issues that you would have to consider, all three would have to be answered yes unanimously before a death penalty would be imposed by the Court. Does the fact that if these issues are answered yes and that is all you have to do in this case now, you know the end results, but all you have to do is answer yes, and the Court, not you, imposes the death penalty, does that, Ma'am, in any way lessen what might be an awesome burden on you?

A No, I don't think so.

Q You have no emotional feelings about the fact that the Court would do it and that you don't do it, so therefore, it takes some of it off of you, it takes a little bit away from you and makes it easier to do?

[p. 802] A Not in the sense that it should make the first decision any easier. I – I don't think that would help me make the decision any easier.

Q Okay. Do you know – now, the third question as everybody as said, is more of a troublesome question because we understand that a person committing an offense does not have the right to claim the defense or justification or self-defense. Can you, Ma'am, conceive of

a certain set of circumstances where, as in number three, the conduct of the defendant, in killing the deceased, was reasonable in light of the provocation that the – the provocation of the deceased?

A I think so.

Q Would the fact that a person may be protecting his own property as one has a right to do after one works for something and gets it, and the fact that a person, while protecting his property, is killed, although he may have provoked the killing, how does that square with you?

THE COURT: Rephrase your question, Mr. Mock, as to the last part of it, how does it square with you in relation to what?

[p. 803] Q I would ask you how does it square with her feelings about intent?

A If the deceased had done whatever actions in order to provoke someone who was going to rob him, I could see where there – where some circumstances, where a robber might have to act in some way. Am I getting close to what you are talking about?

Q Yes Ma'am, but I am not even trying to put the deceased person in the light of intentionally provoking someone, just protect – just responding to protecting his own property.

A Yes.

Q An example may be, let's say a fifteen – sixteen – seventeen year old kid going into a store and he is just as afraid as the man who owns the store is, but he needs the

money and wants the money and the only way he can get it, to his knowledge, is with a gun, because he knows nobody is going to give up the money voluntarily, so you have to have that force. He is there and he is shaking and scared and the man sees him and feels that he is scared, says what I have got here is a young punk. I'll fix him. And he reaches for something, we don't [p. 804] know whether he has got a gun or not. The person who is doing the robbery, never even sees a gun, but that reach may be enough to provoke the scared kid into reacting, and shooting. Can you envision a set of circumstances of something like that, that is what I am getting at.

MR. HOBBS: Objection, Your Honor.

A Yes, sir.

THE COURT: She has answered the question.

Q Doctor Montague, are you of the frame of mind now that if you were sitting in this chair over here, the same one Gary Graham was sitting in, that you would feel comfortable having a person of your convictions sitting on your jury?

MR. HOBBS: I would object as placing the witness in the chair of the defendant.

THE COURT: Sustained.

MR. MOCK: Your Honor, may I respond for the record? I was only asking her, Your Honor, as to her feeling of anything within her mind that might prevent her from being a fair and impartial juror. I was not trying to [p. 805] put her in the place of the defendant.

THE COURT: You may answer that question, Doctor Montague, is there anything that you know of that would prevent you or prohibit you from being a fair and impartial juror in this case?

A No.

THE COURT: Anything else, Mr. Mock?

MR. MOCK: No, Your Honor.

THE COURT: What says the State?

MR. HOBBS: May I have just a moment, Your Honor?

THE COURT: Yes, sir.

MR. HOBBS: The State will accept.

MR. MOCK: You can swear her, Judge.

THE COURT: Will you stand and be sworn and raise your right hand, Doctor Montague?

(At this time juror sworn as a juror)

THE COURT: Doctor Montague, we are, as you can see, in the middle of a long process to select a jury in this case. It is time consuming, however, we anticipate the jury selection will be completed by the end of next week. We hope and anticipate that the actual evidence in the trial of the case will begin on [p. 806] Monday, the 26th. You are free at this time to go back to your home or your work or elsewhere, and we will notify you as far in advance as possible as to the actual trial date. It probably will be in the middle part of next week we will begin that. We have your home and business phone numbers, and

Mr. Pollinger, who is serving as the Bailiff, in this particular proceeding, will be notifying you at the middle part of next week to inform you definitely as to when we will begin. We will have the trial in my Courtroom which is on the fourth floor of this building. The trial will not be up here. It will be in the Courtroom. With that, you are excused. Thank you very much.

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[p. 879] MR. DONALD G. ONDRUCH, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q You are Mr. Donald Ondruch?

A Yes, sir.

Q All right, sir, Mr. Ondruch, by virtue of your being number one on the panel, obviously we are not giving you much time to think about what your feelings are, but obviously, we have to speak to somebody first, and you drew the black ball. I have covered quite a bit of information about the trial of a criminal case, however, I know you are one of the individuals who has had prior civil and criminal jury service, so I know much of what I have spoken about you have heard before in your other jury service. And I noticed in looking at your individual form you say that the case that you served as a juror on approximately 4 years ago was a criminal shooting case. Was that a capital murder case?

A No. That 4 years may be incorrect. It may be [p. 880] a little more than 4 years.

Q Is there anything I have talked about in the preliminary discussion about the trial of a criminal case or the constitutional safeguards that apply that you have any questions about?

A No.

Q All right, sir. As I have stated, Mr. Ondruch, we are very much concerned about one dominating issue

with regard to people who serve as jurors in this case, and that is the individual feelings of 12 people who serve on this jury with regard to the issue of capital punishment. Have you had an occasion, Mr. Ondruch, in your adult years or in the past to get some feeling about – strike that, with regard to the issue of capital punishment as a means of punishment or as a type of punishment, have you ever thought about what your feelings are?

A Not really.

Q Let me ask you this: Do you think, sir, that you could take part in a jury verdict where the issue of capital punishment was the possibility?

A Yes, I can.

[p. 881] Q I take it, then, Mr. Ondruch, that by your answer you have no conscientious, religious or moral scruples against the imposition of the death penalty as a means of punishment in a case you felt was proper, is that right, sir?

A That is right.

Q Okay, since you have not served on a jury in a capital murder case, I want to take a little bit of time to explain to you how a jury makes the decision that it makes. The jury does not receive a blank piece of paper from the Judge that is slid under the door and the jury does not write down life or death. That is not the way it is done. I submit a charge to the jury as I am sure you are familiar with the Court's charge?

A Yes, sir.

Q In that charge, there are at least two special issues, and I know that by virtue of you having served on a civil jury, that you are familiar with the term, special issue. You have a leg up on quite a few of the people we have talked to because this is totally greek [sic] to them, but the special issues that are [p. 882] presented in a capital murder case are only presented on the punishment phase of the trial after an individual has been found guilty of capital murder, and by definition of capital murder as being the taking of a person's life while the accused is in the course of committing another felony offense. Do you understand that, sir?

A Yes, sir.

Q Hypothetically speaking, it may be a 7-Eleven killing where the clerk is robbed of money at gunpoint and then shot and killed?

A That is true.

Q That is what removes it from the realm of all other criminal homicides. In the presentation of the Court's charge to the jury, there are at least two special issues on the punishment phase of the trial. Those two special issues are attached to the bulletin board to your right. If you would take a moment to look at those and then we will speak about them a little further. Have you had a chance to look at it?

A Yes.

Q Assume, if you will, we are on the punishment [p. 883] phase of a capital murder case. You have found the defendant guilty of capital murder. You have said that

he has taken another person's life while in the course of committing another felony. Okay?

A Okay.

Q You are now on the punishment phase, and in reading this first special issue, I think it is obvious that we are asking you to reflect back on the testimony that you have heard in the first phase of the trial because we are asking you about the conduct in which the defendant took the life of the person that he killed. Okay, we are asking you two questions about that conduct. Number one, did he do it deliberately and number two, did he reasonably expect that he was going to kill the person that he killed. I think you can look at that and see those are the key words we are talking about, okay?

A Okay.

Q There is a little bit of difference on the second phase of the trial from the first phase, and I am sure you know this from having served on a criminal jury. Certain terms are [p. 884] defined in a Court's charge, like intent is defined. Another – other words are defined in the Court's charge. In the theft case, theft is defined for you. Property is defined. There are certain legal definitions from the punishment phase. I will not give you a definition as to deliberately. I will not give you a definition as to reasonable expectation. We will call on you to use your common sense. I can give you some thoughts that I have about what these terms mean, and you can use your individual feelings one way or the other, whether it means the same to you or something different. In my mind when someone does something deliberately, it

means he intended to do that. It was his conscious objective to do what he did. It doesn't necessarily mean that by doing something deliberately you planned out or premeditated that act, but for instance if you reach around and deliberately pull a cup from this water fountain and fill it with water and drink it, someone could say you did that deliberately with your intention to do it. It was your conscious objective. It does not [p. 885] mean that you thought about it for three hours before you turned around and did it. Secondly, we are faced with the decision in reviewing the defendant's conduct as to whether or not when he took the life of the deceased, and you found him guilty of taking the life of the deceased, whether or not he reasonably expected that the death of the deceased would occur. Did he have a reasonable expectation that when he did what he did that that person was going to die. And I think I can draw two hypothetical situations that may cause you to see the distinction. Let me say this up front before we go further. We do not want anyone on the jury who has their minds made up as to these special issues before they heard whatever testimony is presented on them. We do not want anyone who feels like that, and if you feel this way, tell us now, that if you say, well, if you take another person's life well, your life ought to be taken too, because that obviously does not apply in this situation. There is other testimony that you should hear before you make your mind up. That is not to say that we would in any way [p. 886] criticize your feelings or disagree with you. It is just we can not have people that feel that way. We have to have people that can say I will only make the decision with regard to whether or not the death penalty

should be imposed after all the testimony is in and then I will decide. Do you understand that, sir?

A Yes.

Q Okay, let me give you these two hypothetical situations to show you where I see a distinction in deliberately and reasonable expectation. Assume we are talking about a 7-Eleven situation we were talking about. A person walks in with a pistol. He is a very small person, so if he walked up to the clerk without a weapon and asked for money, the clerk wouldn't want to give him any money. So he has to have some type of force to get the money he wants. He needs the money because he has a sick baby at home and there is no other way to get the money. So he goes in the store fully intending to use the pistol to get money from the clerk, but never intending that anybody be hurt by that. [p. 887] His sole objective when he goes in there is to get money and not hurt anybody. He walks into the store and as he walks into the store, someone has left water on the floor and as he walks in, he slips on the water on the floor and his feet flies out from under him, and the pistol hits the deck, a bullet is discharged accidentally from the pistol and the store clerk is hit with the bullet and dies. In viewing that situation, you may look at that and say well, that person went in the store to commit an aggravated robbery, and it resulted in the death of that person so that person is guilty of the offense of capital murder. That, now I have to decide if he should get the death penalty or not. In reviewing that, you may say – you very likely may say no, I don't think he reasonably expected that he was going to kill that person that day. He expected to rob him, but didn't expect to kill him, so you very well might

answer that issue when asked about his conduct and that he reasonably expected to kill that clerk, you may say no, he didn't reasonably expect to kill him. And [p. 888] let me give you these other instructions. There is no secrecy in the jury's verdict with regard to them personally knowing what the result of their verdict is. If you serve on a jury, this jury, and you answer these special issues yes, uniformly all of them are answered yes, you are going to know individually and as a jury that the defendant is going to get the death penalty because I don't have any way to change your answers. The law does not allow me to impose punishment that I deem to be proper. This is the only situation that a defendant has no alternative but to go to the jury for punishment, and if there is a unanimous yes answer by all 12 people as is required by law to be answered yes, all 12 must believe it should be yes, it is not like it was in the civil case where you can answer one of those special issues by 10 – 2 yes or no. A yes answer requires a unanimous verdict by all 12 people, and the State of Texas has the same burden of proof of proving to you beyond a reasonable doubt that the answers should be yes, just as it had the burden of proving to you that you [p. 889] should find him guilty, and to prove both phases of the trial to you beyond a reasonable doubt. Do you understand that, sir?

A Yes.

Q A no answer with regard to the jury goes back to a 10-2 system that you used in the civil case. If the jury feels that no, he did not reasonably expect to kill the deceased and 10 of you feel that way, then they can answer it no. If 6 of you feel yes and 6 of you feel no, then

they have to continue in their deliberations. It has to be a unanimous yes or 10-2 for no, okay?

A Okay.

Q Let's assume another hypothetical situation on the first special issue. The same person goes in to rob that store clerk. He robs the store clerk and for no reason guns him down in cold blood – cold blooded killing. You look at that situation and you say well, in that situation I think the guy deliberately embarked upon that conduct that resulted in the person's death, and then he reasonably expected to kill the person. You very well might answer that yes because you have the [p. 890] cold blooded killing. Whereas, in the other one, you have more of an accidental situation. So you see how those distinctions could vary and that is why I say it is so important that we have people with an open mind. Do you understand?

A I understand.

Q If you would take a moment to look at number two. I think it is obvious to you in looking at that second special issue that we are asking you to, in a way, put on your crystal ball and predict the future. We are asking you whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society. The State can't prove to you beyond a shadow of a doubt if you put him back on the street he would commit another criminal act of violence that would be an ongoing continuing threat. Their burden is proving beyond a reasonable doubt, based on his past record, if he has a prior criminal record; based on other crimes he has committed, if he has committed other crimes; based on what other people say

about [p. 891] him that know him. They say he is a violent person or unlawful or not, a peaceful and law abiding person. You can consider all of that input and then reach your decision as to whether or not he is more likely than not to commit criminal acts of violence in the future. Okay?

A Okay.

Q Let me give you a little further discussion about the terms in number two. Whether there is a probability. In my mind, probability means its more likely than not, not that it is a lead pipe cinch he is going to do it or not, even that it is possible. To me, it is 51%, more than likely he is going to do it, but once again, it is your individual interpretation that he will commit criminal acts of violence in the future. Acts of violence does not require there be another capital murder that we are talking about. It can be from someone pushing you on the shoulder and you find that offensive. That is an act of violence. That is a Class C assault to the other end of the spectrum, which is capital murder. So you can see [p. 892] there is a broad field there in criminal acts of violence. That covers assault, robbery, rape, kidnapping, even criminal – the offense of violence against property. Someone steals a radio out of your car or truck. That is an act of violence. That is an act of criminal mischief. So, all these fall within that area of the criminal acts of violence, and would these acts of violence that the defendant would probably commit constitute a continuing threat to society, and the ongoing threat to society. A threat not only to the people out here on the street, if you put them back on the street, but if you put him in the penitentiary, would he be a continuing threat to those people in there. That is part of

our society, too. At least those two special issues would be presented on the punishment phase. Do you have any problem with that, sir?

A No.

Q There probably may be a third special issue and we can't say it definitely will be there or won't be there because we haven't heard the testimony, but there possibly may be a [p. 893] third special issue, and that deals with whether or not the person who was killed did anything to help provoke the situation that resulted in his death. Let me say a couple of things about this special issue. Number one, you would only receive this special issue in my charge if it is raised by the evidence. It doesn't mean there has to be 50 witnesses that testify that the deceased in some way provoked or helped provoke the defendant. If there is only one line of testimony, if the defendant or someone else were to testify and say well, that guy reached out to grab me or that guy pulled a pistol out from under the counter, if there is some way the deceased helped provoke the situation, then that issue has to go into the charge. Do you understand that, sir?

A Yes.

Q Let me go on further to say that we are not in any way excusing the actions of the defendant because you have found him guilty of capital murder. You are saying you are only going to get one of two punishments, and this is true, Mr. Ondruch, and when the [p. 894] defendant is found guilty of capital murder, he can only receive death by lethal injection or life in the penitentiary. There is no other option for the jury. If the jury answers all of these yes, he gets death, and if the jury answers one or

more of the issues no, it is life. He gets life and once again, I have no discretion to change your verdict. But we are not in any way saying that the defendant was right in taking that person's life, but what we are doing is asking you to evaluate the actions of the person that is killed to see if he in some way provoked the difficulty. A defendant in a capital murder case cannot claim self defense. The reason that he can't is because he has provoked the difficulty in the first place when he walked into that store with the pistol to rob that clerk. He started the ball rolling. He provoked the difficulty. In fact, the clerk pulled the pistol out from under the counter and he shoots and kills the clerk to stay alive, he can't claim well, I only shot him in self defense. He can't claim that. That is a legal justification for a killing. He [p. 895] can't do that. He can only say the clerk brought about his death and I wasn't going to kill him, but he brought it about because of something he did, and asking you, the jury, to consider what the clerk did because I'm asking you not to sentence me to the death penalty but to sentence me to life. And if you feel that the actions in the killing of the clerk were not unreasonable because of what the clerk did to provoke this and bring about his own death, then you would answer this question no and sentence me to life in the penitentiary. We are not excusing the defendant's conduct in any way. We are considering this if it is proper in your determinations as to whether or not he will get life or death. This special issue reads if you will take a second to read it. If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. So the fact that the deceased was killed, that he in some way

possibly brought about some action to bring about his death. Let's go back to a situation [p. 896] that I was talking about where the defendant has walked in just to rob and not to kill. He takes the money and he has no inclination to hurt anybody else. He turns to walk away. The clerk pulls a pistol out from under the counter and shoots and hits the defendant in the back as he is walking from the store. As the defendant falls to the floor, he turns and fires at the clerk because he knows if he doesn't shoot him, the clerk is going to kill him. So he is acting in an act of self preservation. He can't claim self defense because he provoked the difficulty, but he is acting to preserve his life and if the clerk had not pulled the pistol out from under the counter, he would have not died because all the man wanted was money. He didn't want to kill him. So in viewing that situation, you might say I believe that the deceased helped provoke the situation by pulling that pistol out from under the counter. If he hadn't done that, he wouldn't have died. So I then have to view that conduct in light of the defendant's testimony and to say was the defendant unreasonable in taking the clerk's [p. 897] life or was he not unreasonable based on what that clerk did. You may answer that question I think he was unreasonable in killing that clerk or you may answer it no, I don't think it was unreasonable. I found him guilty and I'm answering no not to condone what he did, knowing that the man is going to get life and not death because of the fact that he didn't intend to kill that clerk. That clerk brought about his own death by pulling the pistol out from under the counter. Do you understand the distinction?

A Yes.

Q Is there anything we have talked about, sir, that is difficult for you to understand at this point?

A No.

Q You further understand on that first special issue, Mr. Ondruch, talking about deliberately and reasonably expecting the death, do you understand that there is a possibility that the person's intent may change. He may walk into the store, not intending to kill somebody, and because of the actions of the person who [p. 898] was robbing, say, the clerk pulling the pistol out of the counter, may result in that person being killed, and he may not have reasonably expected that the person was going to die when he walked into that store. So we have the accidental situation that I was talking about where the pistol falls to the floor and the bullet discharges, or we have the situation where he may have walked in just intending to rob and not to kill and things happen that changed the situation. Things change, see, that situation may apply to. Do you feel, Mr. Ondruch, could you have an open mind on all of these situations?

A Yes.

Q And you could hear all of the testimony before you make a decision to sentence the defendant to life or death after you found him guilty of capital murder, if you do?

A Yes.

Q Okay, this is all what I plan to talk to you about Mr. Ondruch. The lawyers now have a chance. Mr. Hobbs, the Assistant District Attorney and Mr. Mock or Thornton, for the defense.

[p. 899] EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Good morning, sir. I see that you have – your younger children, what are their ages, your daughter and son?

A The oldest boy is 19 and he is going to college, and I have – and the oldest daughter is 16. She is a junior in high school, and a younger daughter, she is in junior high, 7th grade, and a baby boy in the first grade.

Q Okay, now, the Judge has told you, in talking to you quite extensively about the rights of the defendant and what we are looking at here, and it is a serious matter, and we are going to ask you questions and not to try to confuse you, but to get your thoughts because your thoughts are what we want to hear, not any pat answers because we have to make our decision in representing our particular client, both myself and the defense as to if we feel that you can be a fair and impartial juror. Now, I would like to go over a few things. The Judge told you there are two phases to the [p. 900] trial. The first phase being guilt or innocence phase. Needless to say, if the defendant is not found guilty, there is no punishment phase, and the issue of life or death is not appropriate. I would like to talk to you about burden of proof. Remember, the Judge talked to you about that? It is not proof – the burden is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it was beyond all doubt I think you would agree, sir, you would have to have been present and saw what happened, and made your own decision on it to remove all doubt from your mind. If you are, in fact, in that position, you could not be

a juror. You would be a witness as to what had happened. Would you agree?

A I agree, sir.

Q The burden of proof doesn't mean motive. I don't have to prove why he did it. Did he do it and in what manner. Now, you, as a juror, in your prior jury service, you know that the Judge gives you the law. You have to apply the facts to the law. You determine what those facts are, and the jury's job is to [p. 901] resolve conflict. If there wasn't conflict, I can assure you, that we wouldn't be here. Just the mere fact that we are here, there is conflict?

A Right.

Q Now, looking at the elements of the offense, what the State must prove beyond a reasonable doubt. The Judge told you that is only the elements of the offense, nothing more. Now, here, that it was Gary Graham, the defendant; that it occurred in Harris County, Texas; that it was on or about May 13, 1981; that the defendant, Gary Graham, did then and there while in the course of committing or attempting to commit one or the other, the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Do you have any problems with that? Those are the things we must prove beyond a reasonable doubt?

A No.

Q Now, we are looking at murder plus. Here, murder in the course of a robbery, aggravated robbery. Intentional. I can't show you what a person is thinking. I can't

go into their [p. 902] mind and pull it out and show it to you in my hand, but I think that, would you not agree, sir, that an individual's intent can be implied by his actions alone, by what he does or by his words alone, by what he says or by a combination of words and actions, to show what he meant to be doing. The Judge will define intent. We have to show that it was an intentional killing, not accidental, but on purpose, intentional. Not premeditation, no motive. Now, the key phrase is robbery, during the course of committing robbery. What is robbery. The legal definition, a person commits the offense if in the course of committing theft, a person, with intent to obtain and maintain control of the property, intentionally or knowingly or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death, and if you use a deadly weapon or cause serious bodily injury, it is aggravated robbery, okay?

A Okay.

Q Now, in the course of, I would like for you to [p. 903] look at this, in the course of committing theft. That doesn't mean – I can commit the offense of robbery under our law without ever getting any property. As an example, I came up to you and I said, Mr. Ondruch, I want all your money, and I have got a pistol on you. A police officer comes up to me and puts a pistol to the back of my head. I haven't got a dime from you, haven't gotten anything, but I have committed the offense of aggravated robbery. Do you have any problems with that?

A No, sir.

Q It means in the course of committing theft it means conduct that occurred in an attempt to commit or in the commission of or in the immediate flight after the attempt. As an example, it can be in the commission of theft. You had a pen in your pocket. I could come up to you, not say anything, grab the pen, take it from you and start, and turn away. As you follow me, you touch me on the shoulder and say give me my pen back. I turn around and shoot you. I have committed aggravated robbery. Any problem?

A No problem.

[p. 904] Q Now, you understand our law an individual, when he reaches the age of 17 years is considered an adult for all purposes in the law. Needless to say, 17 is young, but our laws state that. Would the mere age of a defendant, if you believed beyond a reasonable doubt that the State had proved each and every element of the offense for which that individual may be charged, would that – the age of the individual cause you to disregard any testimony or treat that individual any differently than you would someone else?

A No.

Q You realize that it is the State's burden on both stages of the trial. The defendant doesn't have to do anything. The State can't call the defendant to the stand to testify?

A I understand.

Q Now, I want to give you an example that we can use in a discussion of this case as to both phases of the trial. There are two parts to the trial. Guilt or innocence

stage, and punishment phase, okay, and I want to use this example. Okay, we – let us preseume [sic] that this room is a 7-Eleven store, okay?

[p. 905] A Okay.

Q And that you are present in the store. Let me change that. That Mr. Orte here is where you are. He is present in the store. That the clerk, Ms. Hamilton, is behind the register, and she is present, and as you can see, you have a little problem seeing her?

A Yes.

Q Okay, the same situation, there is an obstruction. You can see part, but you can't see what is going on over there completely. Furthermore, let us further presume that Mr. Mock is sitting in the area where Mr. Orte is here, with an obstruction such as this between him and this area out here. Further, let us presume that Mr. Thornton is out in this area. He can see both Ms. Hamilton, Mr. Mock and Mr. Orte, in a position where you are at. I am going to be the perpetrator of the crime. Let us further presume that in the example that I am giving you that Ms. Hamilton is nearing the end of her shift, and that she has closed out the register and fixing to make a deposit. She has taken out the money and put the money in a bank drop bag and she [p. 906] has got a smock on and she sticks it in the pocket of the smock, and a little bit sticking up so you can see it, and I know what it is, and I can see there is something in it. Furthermore, that she has got it there and she is holding a box. She is restocking something in the shelves behind the cash register. I come into the store. I see her. I see the pouch. I walk up to her and I start to grab for it. She sees me and she is holding

the box as she has been stacking and she turns to get away from me, to pull away from me, my grasp. I pull a weapon, a pistol, a gun. Mr. Mock sees that gun. He exercises – he saw me, but he is concentrating on that gun, not my face. He hits the deck. He is hiding. As I would – Mr. Thornton sees me, and you are over here where Mr. Orte is. You hear some commotion, but you can't see what is going on, can't see me and can't see her. Mr. Thornton sees Mr. Mock hit the deck and he sees me and I pull – this time I pull the gun out and have it to the head of Hamilton, and he shouts at me. I turn and I see him, and I turn back and she has moved away from [p. 907] me, and I shoot and kill her and run out. I am later caught and brought to trial for capital murder, murder in the course of committing robbery. Okay. They didn't find any weapon on me, and I didn't leave any fingerprints, and they didn't get any fingerprints, if I took anything. Now, Mr. Thornton gets up to testify, and let us further presume that you are on the jury, and you have up to this point believed that the State has proved every element of the offense beyond a reasonable doubt. Mr. Thornton accepts the identify of me as being the person who did it. Now, Mr. Thornton gets up and says I saw Carl Hobbs on that day in Harris County shoot and kill Ms. Hamilton. That is him. If you believed Mr. Thornton's testimony beyond a reasonable doubt, could you, in that hypothetical situation, find me guilty of capital murder, the offense of capital murder, based upon the testimony of a single eye witness, Mr. Thornton, if you believed him beyond a reasonable doubt?

A Yes.

Q Okay, you can see, although there is only more [p. 908] than one person here, there is only one that is going to say who it was?

A Yes, sir.

Q Now, if the defendant has been found guilty, let us go into the special issues that we have here. Looking at special issue number one on the board again, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result. As the Judge has told you deliberately is not going to be defined. It doesn't mean premeditation. I can tell you that. It doesn't mean accidentally. Webster defines it as being willful or voluntary. Do you have a definition that would be somewhat different than that, sir?

A No, sir.

Q Okay, looking at this particular question, just the way it is written, requires that you have to consider the facts of the case, the capital murder offense, in order to answer it, what, in the example, what did I do. Okay? How did I act? Did I do the act deliberately? Deliberately, I think, would you agree, in the [p. 909] statement that a deliberate act can be an act with just short thought, not an extended period of thought, whether or not I committed the act deliberately and with the reasonable expectation that the death of the deceased would occur. That would vary according to the circumstances that you, as a juror, will have to find. I think you can see in the example that I have there that probably may or may not be much of a problem for you to determine whether or not my actions was that there was a reasonable expectation that I was

going to kill her when I did. Do you have any problem with that, sir?

A No, sir.

Q Let us presume that you have answered this question. Now, we go on to the second special issue, and the Judge told you these two special issues will be in every case, every case of capital murder, if the defendant is found guilty. That second issue is whether or not there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Once again, probability is not [p. 910] defined. It doesn't mean absolutely. I can feel rest assured in telling you that means likely, possibly. Do you have a definition, sir, that you feel comfortable with the word probability?

A As far as -

Q What does probability mean to you, sir?

A It is possible.

Q Now, in this phase, this particular question, I think that you would see that the actions of the individual in the offense for the capital murder that you just found will give you some idea in answering this question. Also during this phase of the trial, the punishment phase, the Court, at its discretion, can allow testimony for the benefit of the jury as to all elements that he deems relevant. Okay. That can include, but not have to, prior criminal record, if any, other acts of criminal violence, if any, reputation testimony may or may not be there. Could be something could be bad, to help the jury in deciding what is the probability, if any, that the defendant would

commit future acts of criminal violence. Do you have any problem [p. 911] with that, sir?

A No, sir.

Q Now, criminal acts of violence. The Judge has defined that from as little as taking a knife and scraping through the top of this banister. That is a criminal act of violence. Slash a tire. Break a window. Touch you. If you felt it was offensive, I have committed a criminal act of violence. It could be as little as that. It could be as much as a murder or aggravated robbery, rape, some definitely serious crime that nobody disagrees with, but it could be a [sic] little as these others. So when you are asking yourself the probability, whether or not you have to consider the small end as well as the large end. Would you agree with that, sir?

A Correct.

Q Now, going back up to special issue number one, reasonable expectation. You don't have any problems with that, do you?

A No.

Q No problem with the aspect of probability?

A No, sir.

Q Criminal acts is a threat to society, not that [p. 912] he is going to do it every day, but would it constitute that continuing threat in society is that broad scope from everyone walking around in the street to those in the penitentiary?

A Yes, sir.

Q Is it conceivable in your mind that certain types of persons can be a threat to even people confined by their actions, the guards that are maybe caring for the people in the penitentiary as a possibility? Would you agree or disagree with that concept, sir?

A Yes, sir.

Q Okay, special issue number three is raised only if raised by the evidence. It is a little bit more difficult, but really, not that hard. Now, it is not an excuse, and we are not looking for something to say, not all acts of an individual are going to be provocation, okay?

A Okay.

Q You have to decide what, if there was any, provocation just because the issue is there, you decide whether or not it was provocation and if it was provocation, it might not be in [p. 913] your mind, if there was, and if whatever that person that died, the person was killed, did something that the killer acted on or he did in return of this action by the party that was killed. Was it unreasonable. In the example that I gave you in the hypothetical, where I shot and killed Ms. Hamilton, after she turned from me and Mr. Thornton hollered at me, I just turned and shot her. If, in that example, and the Court deemed that to be a proper case for this issue to be submitted, then you would have to determine whether or not the actions of Ms. Hamilton was any provocation. Okay?

A Okay.

Q My response to that action of her, was it reasonable? Was shooting her a reasonable act on my part. If it

was unreasonable, the answer requires, and you believe beyond a reasonable coubt [sic], the answer should be yes. Now, my question to you, sir, definitely these two will be here. This one may not. Do you have any difficulty with that concept?

A No, sir.

Q Issues number one and two if it is one issue [p. 914] or two issues, you realize upon a finding of yes an answer of yes to both of those issues gives the Court no discretion. The Court will impose the death penalty. He will impose it. If either one is answered no, then life in prison. Would the fact if you believe beyond a reasonable doubt that the answer to special issues number one and two, and if three is submitted, to three, are yes, knowing that that yes answer, by unanimous verdict by the jury would result in the imposition of the death penalty by the Court, would that preclude you as an individual from voting yes, even if you believed it to be the proper answer?

A No.

Q Is there any reason, sir, that you feel that you could not be fair in this type of a case?

A No reason.

Q Okay, thank you very much. Pass.

THE COURT: Mr. Thornton, you may question the juror.

[p. 915] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORTON:

Q Good morning, Mr. Ondruch, my name is Chester Thornton, and I am defense counsel for the defendant in this case, Gary Graham, and it is now my opportunity to talk with you to be able to discuss your views on certain issues and to ask you questions and judge your responses in order to determine whether we can select 12 impartial jurors, and that is what we are trying to do, select 12 impartial jurors. My questions to you are going to be personal and they are going to be direct in a sense and I want you to be open and honest with me. My position is not to humiliate you or embarrass you about your beliefs, nor am I here to debate with you on how you feel about certain issues. My purpose is to find out your gut feelings on issues and your beliefs. I'm of the mind that my beliefs are my beliefs, and nobody can change by belief, and I don't mind telling anybody how I feel about my belief, and this is the attitude I would like for you to assume [p. 916] because I am trying to get your inner feelings and like I am saying, I am not trying to embarrass you in any way by any of my questions. I know that you have been on a criminal jury before, right?

A Correct, sir.

Q Were you able to reach a verdict, without telling me what the verdict was, were you able to reach a verdict?

A Yes, it took some time.

Q So, this process is really not new to you. You have been through this before, right?

A Yes, sir.

Q What was your response when you first received your jury summons?

A Just another duty to perform.

Q Just another jury duty that you were going to have to spend?

A That is right.

Q What was your response when you found out it was a capital murder case you were going to have to sit on?

A None.

Q No difficulty?

A No difficulty.

[p. 917] Q Did you feel any more of a burden in your responsibility as a juror when you found out it was a capital murder case instead of, say, just the aggravated robbery case you sat on before?

A No, sir.

Q I noticed you are an engineer for the State Department of Highways?

A It is engineering with highways and construction of highways and roadways.

Q What would your daily responsibility be? Describe to me a typical day for you?

A My typical day, I really work for the public, for the Highway Department and we have several jobs under

different residence engineers and I am just one of the managers in the engineering department for that particular area in construction. The roads, construction work, so forth, and so on.

Q Is your job an outside or inside job?

A It is both, outside and inside.

Q Do you have the opportunity to supervise any people?

A Yes, I have 4 people under my supervision.

Q Four people under your supervision?

[p. 918] A Yes, sir, it is in the surveying department.

Q Okay, do you enjoy what you are doing?

A Very much so.

Q Okay, seeing that you have served on a criminal jury before, do you understand the Judge's instructions about the presumption of innocence and the burden of proof, you have been explained that today, and prior to today on your other jury service, is that right?

A That is correct.

Q You don't have any problems understanding that and weighing the possibility that you might have to sit in judgment of a person's life, life or death?

A No.

Q No problems with that?

A No problems whatsoever.

Q Do you think that might change the way you feel about the burden of beyond a reasonable doubt because the fact that a person's life hinges on your decision? Would that alter your perception of what is reasonable and what is not reasonable?

A No problem.

Q Okay, was there anything about that prior jury [p. 919] experience that might leave a bad taste in your mouth, that might affect you on how you might deliberate in this particular case?

A None whatsoever.

Q Okay, and you understand about what is evidence and what is facts and what is not evidence and what is not facts, right?

A Correct, sir.

Q The only evidence that is pertinent to this trial is what is heard from the witness stand, right?

A Correct.

Q What you might hear on the street is not pertinent to the trial that you potentially will be sitting on, okay?

A I understand that.

Q All right, there is a couple of things I want to go through with you. The State, through Mr. Hobbs, raised a hypothetical situation to you where the one eye witness testimony and he said where he entered the store and pulled a gun on Ms. Hamilton and shot her and Mr. Mock had ducked down and he couldn't see, Mr. Orte couldn't

get a good view and I was the only one that actually saw you. Going back [p. 920] to this hypothetical, that particular hypothetical, and he asked you your feelings on one eye witness, and could you return a conviction or a guilty verdict if you believed beyond a reasonable doubt that eye witness testimony, okay, that is the hypothetical I am dealing with. Would the fact that a defendant or a person is charged with or who is found to be guilty of capital murder and who faces a mandatory prison – mandatory punishment of either life or death, would that change the way you would want to weigh that eye witnesses' testimony or how would that affect you in your deliberations of that one eye witness testimony because of the fact that a capital punishment is a possibility?

A I have no feeling.

Q You would be able to weight it regardless?

A Yes.

Q Okay, could you tell me basically your views on capital punishment, and the death sentence?

A Well, this is my first – if I ever become a juror on this case, it will be my first case I have been on a murder case where the shooting case would be the same thing, and [p. 921] someone has to serve as a juror and I don't mind serving, and try to be impartial to all aspects as far as giving the burden of proof and this and that.

Q Tell me your feelings on the death penalty. The possibility that someone could die for their actions, what is your basic feelings on the death penalty, just explain to me?

A There is really no feelings, just depending on the case.

Q I'm saying, but, you have established in your mind that if you were to sit on a jury that you could return a death penalty, right?

A Very possibly, yes.

Q You don't, by your response to the Judge, you have no conscientious or religious or moral scruples against the infliction of the death penalty in a proper case?

A No, sir.

Q Okay, have you held those beliefs for a long time? Have you ever been in a position where you, say, I don't believe in capital punishment, I don't believe in taking ones life in return for him taking another person's life?

A I can't recall being in that position.

[p. 922] Q Okay, have you ever weighed it in that vein, the possibility or the taking of ones life because of the actions of another in taking ones life?

A Yes.

Q Have you ever looked at it from the prospective that the death sentence or the death penalty would be a deterrent to crime in any way that if we can start issuing out more sever [sic] punishment as the death penalty, maybe that would prevent somebody else from doing what somebody else did? Have you ever held that belief in that manner?

A Never have.

Q Okay, do you think that the death penalty is a deterrent to crime?

A Is what?

Q Do you believe that the death penalty is a deterrent to crime, that it would, say, maybe prevent or stop somebody else from doing the some later actions or for killing somebody else by trying rob a store or something?

A It just depends on the case and everything, really.

Q I am asking you to just assume, just your [p. 923] general feelings on the death penalty as it applies to society in a criminal justice system, okay, and that is the prospective I want you to look at. I am not asking you to speak - to speculate on the particular case. We are now outside the realm of the courtroom. I'm not asking you to place yourself in a position of a juror at this particular time, okay? I'm asking you, Mr. Ondruch, how do you feel, okay, about the death penalty. I'm sure you have heard it being debated?

A Yes, I have.

Q In the newspapers and probably television programs, and that is what I am trying to get your understanding of, if you were at home and you were looking at a program about the death penalty, and after the program was over with the commentator, if he was in your living room and asked you how you feel, that is what I want to know?

A You mean as far as the death penalty is concerned?

Q Right?

A Well, my feelings is that I don't like the [p. 924] death penalty to some extent, but if there is reasonable – reasons to have the death penalty for the particular case, I will go along with the death penalty.

Q Okay. What would you say would be a reason, would it be the type of crime that it would be committed that you would consider the death penalty or would it be just the, say, the actions of the individual or just your emotions of how you felt?

A Depends on the actions of the case.

Q Okay, would it make a difference, say, you would apply the death penalty in certain cases, in certain types of cases and that is different, I mean that is different from cases because really, without thinking when you say cases, I'm thinking about the facts of the case and now I'm just talking about the facts of the crime, rape, murder, robbery, have you ever placed in the prospective, I think they ought to get the death penalty for this and not for this and maybe this and this too, have you ever thought about it in that vein?

A I haven't, like I say, this is my first case, if I ever get on it would be something to think [p. 925] about.

Q Okay, going to issue number one and I'll return to that, do you have any problems – strike that – did you understand fully issue number one, you don't have any problems with it?

A No.

Q Would you have any problems reconciling issue number one after you have already found beyond a reasonable doubt that the defendant did and was guilty of

capital murder, okay, because those issues only come into play once a person has been found guilty?

A Right.

Q And is there any problem with you reconciling in your mind issue number one after you have already found that a person has been guilty of capital murder, he has been found beyond a reasonable doubt in your mind that the has been guilty of capital murder, you have voted that he is guilty. Going down to issue number one, would the mere fact you voted guilty, voted that the defendant was guilty in the guilt or the innocence stage make you automatically vote yes to issue number one? [p. 926] I want you to look at it and look at it from the prospective that you have already found him guilty. Would that automatically make you think that he did deliberately cause the death of the deceased, the fact that you have already voted him guilty?

A You are saying as far as capital punishment?

Q No, I am saying as far as special issue number one?

A Yes.

Q Are you saying by the mere fact – strike that – Mr. Ondruch, the Judge has explained to you the issues, right?

A Right.

Q Special issue number one, did you understand that fully?

A Yes.

Q Would you be able to look at that in the prior evidence that you heard at the previous guilt or innocence part, would you be able to look at that objectively and view this question without the help of, say, the assistance that you already found him guilty, would you be able to do it?

A Yes.

[p. 927] Q You would be able to answer this question because you had already found him guilty?

A Right.

Q Special issue number two, take a look at that one.

A Okay.

Q You would agree with me that that is in the sense something you would have to predict, right?

A Right.

Q And would the fact that the defendant faces a possibility of life or death in any way cause you problems in trying to predict the future, and I am saying, what I am asking you there is you have already found him guilty beyond a reasonable doubt, okay?

A Yes.

Q The question, comes now whether there will be life or whether there will be death, okay?

A Okay.

Q What would you like to know in order to answer special issue number two, what type of information would you like to have?

A From, say from the defendant's side?

Q From anybody's side, what would you like to [p. 928] know to answer special issue number two?

A Well, the trial will determine what kind of individual he is to that extent.

Q How do you weigh in your mind, what type of individual a person is, how do you judge people?

A It would – could be anybody, by actions.

Q Would it make a difference to you what somebody else thought about the individual?

A It may make a difference.

Q Would the fact that he might have been in trouble before help you in reaching a decision on that?

A Yes.

Q Would that be the only thing you would want to know, whether he had been in trouble before?

A It just depends, really.

Q Okay, look at special issue number three. Does that cause you any problems?

A No, sir.

Q Well, okay, would it affect your deliberations in special issue number three?

A No.

Q Can you think of a situation, and I am not asking you to give us a hypothetical situation, [p. 929] I'm asking can you think of a situation where it might be possible that the conduct of the defendant in killing the deceased, you have already found him guilty beyond a reasonable doubt, can you think of a situation where the conduct of the defendant, in killing the deceased was reasonable in response to the provocation, that he could be reasonable?

A If it comes out in the case, I would.

Q Okay, so you can think of a situation if it comes out in the case?

A Yes.

MR. THORTON: No further questions, Your Honor.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

MR. THORNTON: The defense will accept.

THE COURT: Mr. Ondruch, will you stand and raise your right hand to be sworn as a juror. May I have the clerk's file, Mr. Pollinger?

(At this time the juror sworn by the Court.)

[p. 930] THE COURT: Mr. Ondruch, this will conclude your service at the present time. As I told you, we are in the middle of a long ardent process. You can see we have to go through this with every individual juror we speak with. We hope and anticipate that we will complete the jury selection by the end of next week. We

are anticipating beginning the actual testimony in the trial on or about the 26th of October. We anticipate that the total testimony will take maybe a week. We hope the trial should take more than a week. We have some phone numbers for your home and your work that you can be reached at. Is this your number?

A I have a field office number.

THE COURT: Would you write that down?

A This is in the field. Now this is my main office and you want to talk to Betty Nigruff. Just ask for her name. This gets the reception and you call her name and explain to her what you want, and my field office, if somebody wants to call there is 923-4680.

THE COURT: Okay. Mr. Pollinger, [p. 931] who brought you over in the panel this morning, will be contacting you by the middle of next week to let you know when we will be starting testimony in the case. As I say, we anticipate it will be on or about the 26th, but we will contact you before that. Thank you very much.

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[p. 995] MR. HUGH R. KILLGORE, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Good afternnon [sic], Mr. Killgore. Mr. Killgore, it has been a long while since we have spoke together as a group this morning. I know in looking at your juror information form that you have not had prior jury service, either civil or criminal. I want to make sure that you understand the principles that I talked about this morning, and you agreed with the principles we talked about. Did any of them present any difficulty for you?

A No, sir.

Q And if you would keep your voice up, this lady is recording what you say. Mr. Killgore, I want to spend a little bit of time talking with you this afternoon about the nature of the situation that we are talking about with regard to the fact that this is a capital murder case. It is necessary, obviously, as I told you this morning, we must make inquiries of you with regard to your feelings [p. 996] on that issue. Initially, let me ask you this: Do you have any conscientious, religious or moral scruples against the imposition of the death penalty as a means of punishment in a case that you would deem proper for it?

A No, not if it is proper.

Q Obviously, it is not a proper punishment for every case. Obviously, it is not a proper punishment for every capital murder case, but what you are telling me,

then, sir, is that you have no conscientious or religious or moral scruples against the imposition of the death penalty as punishment in a case that you would deem it to be proper, is that right, sir?

A Yes, sir.

Q I want to spend some time, Mr. Killgore, the nature in which a jury deliberates upon the verdict in the punishment phase of a capital murder trial. As we said this morning, the burden of proof is on the State on both phases of the trial. The State must prove to you beyond a reasonable doubt that the defendant is guilty of the crime he is charged [p. 997] with committing, and they must also prove that the death penalty is the proper punishment in the case. The defense has no burden whatsoever. Do you understand and agree with that?

A Yes, sir.

Q The jury communicates its verdict to the Judge by the way they answer special issues that are submitted to it by the Judge. I do not send to the jury room a blank piece of paper and have the jury write down life or death. It is not done that way. In every capital murder case in which they have returned a guilty verdict and the jury deliberates on a punishment phase of the trial, there are at least two special issues that are submitted to the jury, and the verdict is determined by the way the jury answers the special issues. Before we discuss the special issues, let me tell you this, they are answered by an answer of yes or no. If the jury unanimously says the answer should be yes to those questions, possibly three questions, the death penalty is their verdict. If they answer no to one or more of the special [p. 998] issues, a

life sentence is the punishment. But only two alternatives for punishment with the person who is found guilty of capital murder. Either life in the penitentiary or death by lethal injection. A yes answer by a jury requires a unanimous verdict, all 12 must agree. A no answer to either of the special issues by the jury requires a vote of 10 or more, so if 10 people agree that there should be a no answer to one or more of the special issues, that is sufficient to answer the issue no. A no answer to any of the special issues, once again, causes me to sentence the defendant to life in the Texas Department of Corrections. I have no discretion. I cannot change the jury's verdict. If the jury says by their answers the defendant should receive the death penalty, I cannot turn around and say I disagree. I would give him life, I can't. And the contrary is true, also. I can't change it from life to death if the jury feels he should receive life. There is no veil of mystery understanding that the jury says what the verdict is. They know by the [p. 999] way they answer those special issues what the outcome will be. As I stated, there are at least two special issues and possibly three. I would ask you if you would, sir, to turn to your right there and there are the first two special issues or the ones we are concerned with right now. If you would take some time to look at those, please?

A Okay.

Q Do you have any questions about either of those first two, about what they say?

A The first one has to do with the death penalty.

Q I'll explain these to you a little bit. The first special issue we are asking you whether the conduct of

the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would occur. Obviously, we are asking you to reconsider testimony that you heard on the guilt or innocence phase of the trial, and for you to decide two things about that testimony that you found him guilty of killing a person whom they killed, that you found him guilty of killing. We are asking you two things. [p. 1000] Number one, when he started on that conduct that resulted in the death of the deceased, number one, did he do it deliberately. Okay, and number two, did he reasonably expect that the person who had been killed would be killed. Do you understand that?

A Yes, sir.

Q Let me give you a couple of examples that may make this a little more clear. We are asking you, number one, did you do it deliberately, the killing deliberately and two, did he reasonably expect that the deceased would die. Assume that someone walks into the liquor store, I know you went to Jones High School, let's assume it is out in the east end. I went to Austin. A person walks in a liquor store and he is short of cash, has a sick wife and baby at home, and doesn't have any money, and he knows he is not going to get any money unless he takes some type of force along with him, because nobody is going to give him any money, and he has to have it. He goes in the store, fulling [sic] expecting to take money, but not that anybody is going to be hurt. He walks in the store, and someone [p. 1001] has left some water by the front door on the floor. He slips on that water on the floor and his feet fly out from under him. The pistol flies out

from his hand and the gun hits the floor and accidentally discharges and low and behold the clerk behind the counter is hit and killed. He intended to rob, but not to hurt anybody. You might view that situation and say I know when he went into the store to rob it he did that deliberately. He would not deliberately intend to kill the clerk nor would the state of mind that he went in there to rob could he reasonably have expected that he was going to kill anybody because he went in there to rob, not to kill. So you see, in viewing that situation, if that was the fact situation that would consider, you might well answer that no, you do not find that he did it deliberately or the death of the person deliberately and reasonably expected that person's death, you may say no to that. On the contrary, let's assume that we are viewing the situation where a person walks up and takes money from the clerk and guns [p. 1002] him down in cold blood, cold blooded situation. You in another situation might answer that yes, yes he did it deliberately and yes he reasonably expected to kill that person. There are different fact situations that would create different answers in the way you answer special issue number one.

A I understand now.

Q One thing I want you to understand is we have to have 12 people who can go into the punishment phase with an open mind. We can't have 12 people who say well, if he has killed somebody, I am going to vote for the death penalty, no matter what the facts are on the punishment phase of the trial. Obviously, if that is the way you felt, it wouldn't make any difference what you felt on the punishment phase of the trial, being good or bad. What we want are 12 people who will go in with an open mind

and if they are convinced beyond a reasonable doubt on the punishment phase the answers should be yes to these issues, then vote yes, and sentence the defendant to death, but on the contrary, if they are not convinced beyond a reasonable [p. 1003] doubt that the answers should be yes, then to vote no and make sure he gets life in the penitentiary instead. Do you think, sir, if you were to serve as a juror, you could go into that phase of the trial with an open mind?

A I think I could. I'm not sure.

Q Obviously, I can't ask you what your feelings would be one way or the other because you do not know any of the facts in the case, but I want to make sure that if you were a juror and you did reach the punishment phase of the trial, you have found a person guilty of capital murder, and you would still follow the oath tha you were sworn to uphold and that is to a true verdict render, according to the facts and the law that is presented to you. That means that you are not to formulate your verdict until all the testimony and evidence is presented to you. Could you agree to do that, sir?

A I don't know if I could at this time because if a man took another man's life and the Bible says an eye for an eye and a tooth for a tooth, so whether he committed it on purpose [p. 1004] or premeditated or accidentally, the man is still dead.

Q Yes, sir. Do you feel, sir, that if that were the situation, if you were convinced beyond a reasonable doubt that he did take another man's life, do you think that you would vote for the death penalty automatically?

A I don't know. I don't know which way I would vote at this time.

Q What you are telling me, sir, and I want to make sure I understand, obviously, we all feel it is wrong to take another person's life, and that there is a difference between taking a person's life as you serve as a juror and taking a person's life if you murder somebody. There is a difference, at least in some people's minds. What we must be assured of is that even if you serve as a juror and find the defendant guilty of capital murder, you do not walk out in the courtroom before you have heard any evidence on the punishment phase and, once again, we haven't gone through what you get on punishment, what you hear on the punishment phase of the trial, we haven't gone that far. We have gone through [p. 1005] the first special issue, but obviously, you can see in some situations, it may be the situation I have talked about where the man walks in to rob and slips on the water and the gun goes off accidentally, he is still guilty of capital murder because he intended to commit a felony which is the offense of robbery and the killing occurred as a result of the act he committed. That would still fall within the province of special issue number one and you might view that differently than you would the cold blooded killing with regard to whether or not you thought a person should get the death penalty or life in the penitentiary, or is that true, would you feel that way, sir?

A No, I would probably feel that way, depending on what the circumstances were.

Q And you don't know what the circumstances are?

A No.

Q Okay, there are aiso other situations when you talk about deliberately and reasonable expectations of death. Assume that we have got a situation where the person goes in a store and robs but not to kill and things [p. 1006] change. You know, the reasonable expectation, he didn't reasonably expect to kill somebody, but the circumstances change. The clerk may have pulled out a pistol from under the counter and fired at him and he fired back. There are all types of situations that present themselves, do you understand? By the same token, there may be a situation where a defendant may have shot a person in the foot and not reasonably expected that person to die and shot him in the foot to just stop him for some reason. Let's assume after he shoots the clerk in the foot, the clerk falls and hits his head on the side of the counter and dies from that. He is still criminally responsible for that. You might view that differently when you say that reasonable expectation that death would occur. If you shoot somebody in the foot, that doesn't mean they are going to die at any time. Do you see the difference in the fact situation I am talking about?

A Yes.

Q In talking about the terms deliberately and reasonable expectation, I think it is obvious [p. 1007] that deliberately does not necessarily mean premeditated. It means that, in my mind anyway, it is a person's conscious objective or intention to do something, but it doesn't mean that it is something he has thought out hours in advance. Would you agree with me, sir?

A Yes sir, in a different state of mind.

Q Premeditation, in my mind at least, possibly yours, requires a more thought out pattern than deliberately requires. Another point I want to make, Mr. Killgore, is the fact that I will not be giving you any legal definition with regard to the terms of any of these special issues. You would just be using your common sense. It is different than on the guilt or innocence phase where I will give you legal definitions as to some of the words that are included in the language of the indictment. The second special issue that is on the board deals with the future of the defendant, and we are asking you to make a prediction based on the evidence that you have heard in the guilt or innocence phase of the trial which you have found the [p. 1008] defendant guilty and if it is proper from other testimony that you might hear about the past criminal record of the defendant, if any, of other criminal offenses he may have committed, possibly what other people in the community may say about him; because we are asking you questions, we – will the defendant probably commit criminal acts of violence in the future that would constitute a continuing threat to society, you know if he goes back out on the street or even put in the penitentiary where he is around other people, we still call it a society, would he probably commit criminal acts of violence that constitute an ongoing threat to society. Probability, obviously, does not mean a certainty, and it does not mean that he 100% would do it. The State must prove to you beyond a reasonable doubt that he probably will, it is more likely than not that he will. And criminal acts of violence, obviously, have a broad range of consideration. If someone were to trip you as you walk down

the hallway, that is a criminal act of violence. It is punishable by two hundred dollar fine. It is [p. 1009] a Class C misdemeanor. If you find the fact they tripped you offensive, that is one end of the spectrum of seriousness and the other end, obviously, is the offense of capital murder, and there is a broad area in between, dealing with assault, rape, robberies, crimes against a person, crimes of violence against property. Someone pours paint on the hood of your car to the extent you have to have it repainted, that is an act of criminal mischief, to its broader area there, and is this person a risk to the extent that he will be an ongoing or continuing threat to society. Do you have any problem understanding these two issues?

A Well, would his past be brought up or not or violent acts?

Q If he had, that is obviously something you would want to consider. If he had a prior criminal record, that would be presented to you. If he had committed other acts of violence, that can be presented to you. On the contrary, if he had never done anything wrong in his life, was just the model of the perfect citizen, and just had this one [p. 1010] horrible episode in his life and had 20 people from the community saying he is a wonderful person, because he wants you to have everything that the law allows you to have in reaching this decision. We want it to be as intelligent a decision as possible. Do you have any trouble understanding those issues?

A No, sir.

Q As I say, at least two, the first two issues will be there. The third issue is more troublesome and I ask if

you will spend some time looking at that and we will talk a little bit more. The first thing I want to point out about that number three is that – that it is only presented to the jury if it is raised by the evidence. I mean if it is raised by the evidence. That means if there is some testimony, even if it is just one line of testimony about a person who was killed in some way contributing to or provoking or helping to provoke the situation. Let's assume that we have got a person going in to the store to rob and not to kill, and he turns to walk out, and not having hurt anyone and the store owner pulls a pistol out from [p. 1011] under the counter and fires and shoots the robber in the back as he is leaving the store, and then the robber turns around and fires out of self preservation and shoots the clerk and the clerk dies. That is not to say we are in any way blaming the clerk for the fact he was killed. We are not even saying he did anything wrong. Obviously, you have a right to defend your property, but what the law is asking you to consider, the fact in this situation is in the matter of determining whether or not the defendant should live or die. He went into a situation not possibly – not intending to kill anyone, but the person that he killed helped bring about the killing. Then you are to consider that if it is raised by the evidence to assist you in determining whether or not you want this defendant to live or die. Once again, we are not condoning the fact that the defendant has taken somebody's life. We are merely presenting this to you for you to decide whether or not it, in your mind, means that he should receive life in the penitentiary as opposed to death. The first two we ask [p. 1012] you to keep an open mind, but the special issue reads whether the defendant's conduct in taking the life

of a person that he killed was unreasonable in light of provocation provided by the deceased, if any, that resulted in his death.

A Yes, sir.

Q So we have got the clerk who pulls the pistol out from under the counter, who has not been harmed in any way. We are not blaming them for pulling the pistol out from under the counter. We are saying Mr. Clerk, if you hadn't pulled the pistol out you would still be alive. He kind of provoked the defendant. He wasn't going to be hurt, and then he pulled out the pistol and he kind of helped provoke the situation by doing it. We are not blaming him, but once again, we are not saying it is, but if raised by the evidence, we want you to know about it, so you can determine whether or not you think the answer should be yes or no, and that will result in the man's life being taken or the defendant being given the death penalty or life. Do you see the significance of this [p. 1013] issue, sir?

A I don't see how you can come to a correct answer on that unless you had a witness if this man is the only man left, he is the only person.

Q Obviously, there has to be another witness. You know, you have got the defendant and we have talked about his having the right not to testify against himself. We have the store clerk, who is dead. You know, obviously, the State can't present any type of case of any sort unless there was at least one other person involved that saw it happen, so if there was only testimony about the provocation by the clerk, it would have to come from one of two sources, either the defendant taking the stand and

testifying or another witness that saw the incident take place testifying there was some type of provocation by the clerk. Do you understand how this could happen?

A Yes, sir.

Q Could you keep an open mind with regard to all of these special issues?

A I think I could.

[p. 1014] Q All right, sir, now once again, depending on the fact situation, you might very well say yes, I think the defendant was unreasonable in killing the deceased because the deceased didn't provoke him in any way. Let's go back to the example the clerk standing there emptyhanded and the defendant gunned him down in cold blood. He didn't provoke anything. You would answer that yes, yes his conduct was unreasonable, because the deceased didn't do anything to provoke him. On the other hand, the situation where I'm talking about where the clerk is alone and he pulls a pistol from the counter, you might view that differently and might say no, as far as it seems to me to say that the defendant's conduct was not unreasonable, you are not blaming the clerk in any way for what you are saying is that he did in some way provoke or add to the situation, and your answer to that issue will be yes or no. Do you understand that?

A Yes, sir.

Q Is there anything we have talked about up to now that you do not understand and I need to [p. 1015] spend some more time discussing with you?

A No.

Q Both the lawyers for the defendant and for the State will have a chance to talk to you now. I have finished taking the time I wanted to talk to you. Mr. Hobbs and then Mr. Thornton for the defendant will have a chance to talk to you. Okay, Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good afternoon, Mr. Killgore. My name is Carl Hobbs, as the Judge told you and I am the Assistant District Attorney assigned to prosecute in this case. Seated in back of me is Mr. Mike Addudel, who may be assisting from time to time. This is Ms. Northcutt, a law student, who is working in our office as part of her school work. Okay. What I would talk to you about, the Judge has told you there are two parts to the trial, and needless to say the first part being guilt or innocence. If the defendant is not found guilty, if he is found not guilty, then we don't even have to worry about [p. 1016] punishment, so the first part I'm going to be talking about is what the State has to prove to you because the defendant doesn't have to do anything. He can sit there if he wishes. Now, the burden of proof is beyond a reasonable doubt. The Judge told you that doesn't mean beyond all doubt or beyond a shadow of a doubt. I think you would agree if it was beyond all doubt in your mind, that you would have actually have to have been present and saw what happened, and then if you were in that position, you would be a witness and not a juror. Do you have any problems with that?

A No, sir.

Q There is conflict. If there weren't conflict, we wouldn't be here in this courtroom. I think you can see that?

A Yes.

Q Your job as a juror is to resolve conflict, to decide what the facts are, how much you want to believe of a witnesses' testimony, whether you want to believe all of it, part of it or none of it. Further, we are going to be talking about what does the State have to prove beyond a reasonable doubt. It is the [p. 1017] elements of the offense. Those and only those elements, and what are they? Okay, they are set out in the indictment. Basically, these are the things. These are the things that the State must prove. These and only these: That it was the defendant, Gary Graham; that it was – that it occurred in Harris County, Texas; that it was on or about May 13, 1981. It doesn't have to be exactly that day. Could be before, could be after, but on or about. That then and there, unlawfully while in the course of committing or attempting to commit, either one, the robbery of Bobby Grant Lambert intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. That is what we have to prove to you beyond a reasonable doubt. Now, what is robbery. Robbery is defined as a person who commits an offense if in the course of committing theft and with the intent to obtain and maintain control of the property intentionally or knowingly or recklessly causes bodily injury to another intentionally or knowingly or recklessly causes bodily injury to another intentionally or knowingly [p. 1018] threatens or places another in fear of imminent bodily injury and death or if they use those things plus using a

deadly weapon or causing serious bodily injury, we have an aggravated robbery. Okay. All right, I can't show you what a person is thinking. I can't go into a person's mind, pull it out and hand it to you as a piece of evidence. Intentional will be defined for you by the Judge. A person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct and cause the result. So would you have problems with this, I can't show you what a person is thinking, but I can show you what he did and by what a person's actions are, one can determine one's intent. Can you also agree, sir, that by a person's words you can determine what their intent is without any actions or a combination of words and actions. Any problem with that?

A There would be no problem.

Q Okay, now, you understand our law in the State of Texas, when a person becomes 17 years [p. 1019] of age, male or female, it doesn't matter until the day you die you are an adult and responsible under the laws of the State of Texas as a criminal or the criminal laws as an adult. Does the mere age of a defendant or anyone charged with a crime, would that affect you in your deliberations to a point, simply because somebody is young or they are old, just the mere fact of age?

A It might have a bearing on it, yes.

Q Okay, would it have a bearing on it on the effect that you would not be able to, if you believed beyond a reasonable doubt that the person charged with an offense, the State proved to you beyond a reasonable doubt that that person did it, and simply because, say,

that person was 65 years old, would you say that person is not guilty?

A I could probably say he is guilty, but not to a first degree murder.

Q What I am saying is on the offense, in other words, say if that person was 17 years old, and the State proved beyond a reasonable doubt that you could – could you find that person guilty, if you believed the State had [p. 1020] proved it to you beyond a reasonable doubt as to the elements of the offense?

A I could probably find him guilty to a certain degree.

Q We are talking about capital murder. Would the mere fact that an individual is 17 years of age stop you from finding that person guilty of capital murder when the death penalty is a possibility?

A I imagine I would have to know all the circumstances involved in it before I can answer that question.

Q I'm asking you mere age, the mere age alone, I am saying that you believe the State has proved everything else, it is just the age, a person 17, would that stop you from – if you believed it?

A If I believed it, it probably wouldn't stop me.

Q Now, I'm going to go over an example that I am going to use in discussing my next question, and then the questions in reference to the punishment phase of the trial. Okay, let me give you an example. Let's assume that this room is a 7-Eleven store, okay?

[p. 1021] A Okay.

Q And that there are four people inside the store, that you are there where you are at, except, let's substitute Mr. Addudel in the position you are in because you are going to be a juror, and Ms. Northcutt is where she is at, and Mr. Thornton is where he is at, and that the clerk is going to be Mr. Pollinger, the bailiff over here sitting at the desk. You can't see him from where you are at right now?

A No.

Q Okay, let's say there is an obstruction like that, and furthermore, let's assume there is an obstruction between this table where Mr. Thornton is and where Ms. Northcutt is. Further, let's assume that Mr. Pollinger is near the end of the shift and he has just pulled – checked out the register and put the money in a drop bag, one of these bank drop bags. He had a coat on and part of the bag was sticking out and before he was getting off his shift, he was stocking some shelves, and he has a box in his hand, going like this. I'm going to be the robber. Okay, and I come [p. 1022] through the door. Mr. Addudel hears something, but he doesn't see me, kind of like you are, might see somebody coming through but not recognize who it is. Ms. Northcutt is where she is at and I approach and I see as I walk up to Mr. Pollinger out of his coat that part of that money bag is sticking out, and I know what it is, and I walk up to him, and I start reaching for it, and he is holding the box now and he turns away from me, and I reach for it again. I grab him and I pull a pistol and start coming up towards his head, at which time Mr. Thornton hollers and when I see Mr. Thornton, Ms. Northcutt also

sees me, but she is looking at that gun, not me. She sees that gun and she hits the floor. Probably like – I turn and shoot Mr. Pollinger, who is two or three steps away from me, and I run out the door. I am caught later on and let's further assume that they didn't get the gun that I shot Mr. Pollinger with. I didn't leave any fingerprints in there, and they didn't catch any property on me that I might have taken from the store. Okay, all they got is me, and I am being tried for capital [p. 1023] murder. Let's further assume now that we are in the trial. You are a juror, and the State has proved every element of that offense to you beyond a reasonable doubt, that a murder occurred, that it was during the course of a robbery, that it was in Harris County and it was on or about a specific date, and we are looking to the issue who did it, okay?

A Okay.

Q Mr. Thornton takes the stand and he testifies and he points me out in the trial and says Carl Hobbs is the one that shot and killed Mr. Pollinger on that date. Okay, and in that instance, all there is is a single witness, one eye witness. She was down and she didn't see who it was. Mr. Addudel was where he couldn't see what happened. Mr. Thornton saw what happened, and Mr. Pollinger is dead. Could you, if you believed Mr. Thornton's testimony that I was the one that shot and killed Mr. Pollinger, base a conviction for capital murder upon a single eye witness testimony?

A If you were convincing enough, I would.

[p. 1024] Q So, you would want to hear and if you believed that person beyond a reasonable doubt, not all doubt, but beyond reasonable doubt, you could do it?

A Yes.

Q Now, if in the instance there, say I was – I'm now in my thirties say I was 19 years old, when I robbed the place, would that affect whether or not you would find me guilty, just because there was one witness?

A If I was certain that you identified the right man, it wouldn't have a bearing on it.

Q So if it were proved to you beyond a reasonable doubt, it wouldn't matter how old I was?

A Right.

Q Now, let's go into the punishment phase, and the reason we are going to go on this, and let's talk about theft for a minute. Murder plus to get capital murder, we always have to have murder plus in the commission of aggravated robbery, in the course of committing theft. Remember the definition for robbery, conduct that occurs in the attempt to commit, during the commission or [p. 1025] in immediate flight afterwards. In other words, I don't have to getproperty [sic] to commit aggravated robbery. If I came up to you and pulled a pistol on you and a police officer came up and stuck a pistol behind my back, the back of my head after I said give me your money and he said drop it, I have committed aggravated robbery. Do you understand that is our law. Does that pose a problem for you?

A No.

Q Let's do this. The pen that you have got, I see those two pens that you have got in there and this one is out of ink, and I am going to take those. I walk up to you and I take them. I haven't said anything, and I turn and

start walking back to where Ms. Northcutt is, and you come up behind me and say give me my pens back, and you tap me on the shoulder and I turn around and stick a pistol in your face. I have committed aggravated robbery because not only I haven't attempted, I have taken it, and in the immediate flight after stealing because I have robbed you and you haven't done anything, [p. 1026] but when you came up behind me and I have a weapon, I have committed aggravated robbery. I can have the property but I don't have to get it to commit it. Now, let's assume in our fact situation that you have found me guilty of capital murder. Now, you have got to look at what is going to happen to me in the punishment phase of the trial. The first question is whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would occur. Okay?

A Okay.

Q Needless to say that special issue makes you look at what happened during this particular offense that you have just found me guilty of. You have to look at what I did when I shot. Did I do it deliberately. Now deliberately doesn't mean premeditated, okay?

A Okay.

Q It is defined by Websters as meaning willful or voluntary. Do you have problems with that?

A No.

[p. 1027] Q If I walked up and I just immediately walked up here and pulled this out, I immediately pulled this cup out and fill it halfway with water, a deliberate

act, that didn't take premeditation. A deliberate act. Deliberately walking in there and filling it up. Now, whether the act was deliberate in causing the death and was there a reasonable expectation that the death of the deceased would occur. And if I came up in a situation and Mr. Pollinger – and when I shot him, if I shot him in the foot, there might be a question yes; I deliberately did it, but is there a reasonable expectation that he is going to die because I shot him in the foot. I shot off his big toe. It doesn't make me less guilty of the offense, but it answers this question, yet on the same time if I turn and shoot him in the chest, it is a little bit different. You have to look at the situation. Could you do that, so you would have to look there and answer if you believed beyond a reasonable doubt the State still has that burden beyond a reasonable doubt to prove that the answer should – to this should be [p. 1028] yes. If you believed the State had proved it to you beyond a reasonable doubt, could you answer it yes?

A Yes.

Q Now, special issue number two, we are going to be iooking at two key phrases. Probability and then criminal acts of violence, which constitute a continuing threat to society. Before we go into it, let's say we are going to be talking about society in a very broad term, that society being not only our day-to-day activities, but would you agree with me that people that work in prisons and in jails are part of our society, too, as well as those people that are in jail, they are part of our society, okay?

A Okay.

Q When we talk about that society, I want you to think about those people. I want you to think about those acts of violence and a continuing threat to those people, too. Now probability, where there is a probability. Now, the probability won't be defined, and in this special issue number two, I think you can see this is where you are going to have to [p. 1029] have additional evidence besides what you have heard in the first part of the trial, what is that type of evidence? Well, in the evidence that the Judge deems admissible and relevant to the issues before the jury. So you, as a juror, could possibly hear some of these types of things, prior criminal record, if any, other acts of criminal violence, if any, reputation witnesses could be good or could be bad. So I think you can see you cannot automatically answer yes or no. You have to look at certain factors in the punishment phase to determine whether or not you are going to answer it and how you are going to answer it, whether there is a probability. Probability doesn't mean absolutely. It does not mean 100% it is going to heppen [sic]. I am sure that you have a definition for yourself on what probability is. Likely, Probable. More than likely. I [sic] doesn't mean it is going to happen. Now, we are going – remember what the Judge talked about, criminal acts of violence. It can mean as little as me going up and slapping Ms. Northcutt. That is a criminal act of violence or coming back in [p. 1030] here and taking a knife and cutting this plastic container of this water. Criminal act of violence. Or knocking you out of that chair, shooting you, robbing you, kidnapping you or murdering you. Now, looking into that and in that, do you have any problems with that?

A No.

Q So you are going to look at the offense, itself, and then these other factors that the Court can allow into evidence before you make your decision. Now, you are also going to have special issues number one and two to answer. Do you have any problems with that?

A No.

Q If you believed beyond a reasonable doubt that the State has proved, now we can't tell you that he is going to absolutely do it in the future. It says is it probable, based upon what you have seen. Now, do you supervise people in your job, sir?

A No, sir.

Q Okay, you have in other types of situations, haven't you?

A Yes, sir.

[p. 1031] Q Now, you make decisions about things based upon the evidence that you have. If you are going to promote somebody, you look at what he has done and what he is doing now and what he has done in the past and project is he going to be a good man to put in this new slot or is he the type of man I have to fire because he has done this and he will probably do worse in the future. You do that every day of your life?

A Right.

Q No problem with that?

A No.

Q Now, special issue three comes into play if it is raised by the evidence. It could be very slight, but if it is even there and it is raised, it is something that you have to consider. Now, let's break that down to the extent of you have got to do two things. In the example that I used there, sir, we have got to decide. Your duty as a juror, first of all, is whether or not there was provocation. It says provocation, if any, and in essence, what actions, what did Mr. Pollinger do? Did he do anything and if he [p. 1032] did something, you have got to decide in your mind was it provocation. First of all, you have got to decide, he might have done something you might say to yourself it is not provocation. If he did something else, you might say it is, depending on what he did. And the situation that I gave you is the example all he did is when I reached for the money, he pulled away, and I shot him. Then you have to look at what I did in relation to what, if anything, he did. And look at the fact situation and base your judgment on that. So you have to look at the facts again. You can see that it might be a little bit difficult. It might be. It says if the reaction, my reaction in shooting him was unreasonable? If you say yes, it was unreasonable, then you ought to answer it yes. And do you realize that if you get three yes answers, by answering them, the Judge is going to have to give the death penalty. Could you, knowing that yes answers would result in the death penalty, if you believed it beyond a reasonable doubt, say yes, knowing that the death penalty would be the punishment?

[p. 1033] A Yes, I could.

Q On the other hand, if one of them is answered no, then it is life imprisonment. Let's change the fact situation there a little bit. It is still a question, say, in the instance there when I came up, I didn't pull a gun like I did on Mr. Pollinger. I took the money. I walked up to him and I saw it there and I jerked it out. I started walking away. He runs to the cash drawer, pulls out his pistol, and I get to the door and he shoots me in the back, and I hit the ground. When I get up I start to get up to get out the door to get away and he shoots me again in the leg, and I turn and I shoot him and kill him. I've still wrong, but you have to ask was what I did, was it provocation and was what I did and when he shot me, was it unreasonable for him to shoot me for what I did? He is not, and in doing it, the law doesn't say he is right, it just asks if it is reasonable under those circumstances. So, you have to look at those circumstances and you can see they can vary?

A Yes.

[p. 1034] Q One instance, something minor, it might not be provocation in your mind. You are going to have to weigh it. Do you have any problem with that, sir?

A No problem.

Q Now, sir, is there any question on something we have discussed thus far that you have not – that I haven't explained very well or some question that has been raised that you would like an answer to?

A Well, I would like to know if you could define the mind of the defendant at the time of the robbery, you

know, was the guy in a stable mind or was he a problem or was he under the infludence [sic] of alcohol.

Q This is the one thing we cannot talk about, the facts of the case. The law doesn't allow us to talk about them, just in general.

A Okay.

Q The purpose in that is when you sit here, can you be fair and can you follow the concept of law and give the defendant his rights and give the State their rights, and then hear the facts fresh, and then based upon those facts, decide the questions based upon the evidence [p. 1035] that you hear. Can you do that?

A Yes, I think I can be fair in my decision.

MR. HOBBS: We will pass the juror.

THE COURT: Mr. Killgore, let me give you this one further instruction. A defendant or an accused in a criminal case cannot be held criminally responsible for his actions if he is found to be mentally incompetent at the time of the offense or at the time that he is brought to Court for his actions, and that also holds true if he is found to be mentally insane. Obviously, as Mr. Hobbs has said, we cannot go into any facts concerning Mr. Graham in this case. I can just give you that general proposition as a matter of law. Mr. Thornton?

[p. 1036] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q May it please the Court?

THE COURT: Yes, sir.

Q My name is Chester Thornton. I will introduce myself, again. I am one of the cocounsels representing the defendant in this case, Gary Graham. It is now my opportunity to talk with you and discuss certain personal views that you might hold concerning certain issues. The reason I am asking the question is – the reason I am asking personal questions is not to embarrass you or in any way debate with you on your views. It is merely to find out how you feel on certain issues. Would you agree with me this is a very serious matter, would you not, the determination of someone's life or whether he will die?

A Yes.

Q So far, we have been dealing with the abstract of the term death penalty, and the seriousness or the result is now upon us. Wouldn't you agree that now we must examine you to determine whether you can be an impartial [p. 1037] juror, then you face the possibility of having to sit and make a decision on the person's life or death in this case, this individual right here?

A Right.

Q I want to ask you first about your job. You said you are a cargo agent with KLM Airlines?

A Right.

Q Do you at any time supervise personnel?

A Not at that job.

Q Do you hold another job?

A Janitorial business where I do supervise.

Q Is it your own business?

A Yes.

Q How many people do you have employed with you?

A Different, maybe 3 or 4 at the most at one time. right now it is not.

Q Is it a job you do after you get off your regular job?

A Right. Right.

Q So you are quite a busy man during the day?

A Right.

Q I notice also that you have served in the armed forces, the armed forces – the Army [p. 1038] E-4 January 1962 to 1960 [sic] and I can't see the last portion?

A December, 1968.

Q December, 1968. Did you happen to have an opportunity to serve in Viet Nam?

A Yes.

Q Were you in the combat or did you actually do any fighting?

A No, I didn't.

Q Okay, I also notice that you have never been or any member of your family has ever been a victim of a crime?

A No.

Q Okay, and you have never been or any family member a witness in a crime or criminal case, right?

A No, sir.

Q You have never served on a jury?

A I have been called, but I never served.

Q Okay, so basically, this whole experience is new to you, wouldn't you say?

A Yes.

Q Okay, could you explain to me basically what your first impression was once you received your jury summons, what was your first thought?

[p. 1039] A My first thought was probably how I could get out of it when I got up here.

Q And what was your first thought when you found out you potentially would be sitting on a capital murder case?

A I thought with the length of it, how long it would take.

Q Did you feel in any way, did you think in any way about your – about the possibility of you having to make a decision on one's life or death when you found out that you were potentially sitting on a jury in a capital murder case?

A I never really had thought about it.

Q Did you understand the Judge and the prosecution when they explained reasonable doubt and the other issues involved in a criminal case?

A Yes.

Q That doesn't cause you any problems?

A No, sir.

Q And did you also understand about the presumption of innocence that the defendant had?

A Yes.

[p. 1040] Q You would be willing to carry that presumption of innocence all the way through until all of the evidence and the facts have been presented to you?

A Right.

Q Do you understand the theory or the concept of reasonable doubt?

A It is to make a judgment on my own on what I think the situation would require.

Q Okay, and in the situation where a person is charged with capital murder, okay, would that change how you would view reasonable doubt instead of the situation where a person was just charged with theft, say a misdemeanor theft, he went into a store, say, and stole a clock radio, or just say a little radio that might have been valuable or valued at $12.00?

A I think the fact that a man's life was taken has a great effect on my decision.

Q Okay, would you weigh it any differently or would you try to weigh it differently?

A That would be a lot different if it wasn't a crime committed in this state.

Q Okay, would you view reasonable doubt any differently, knowing that if the defendant [p. 1041] was found guilty that he faces a mandatory of either life or death?

A I can't answer that right now because I don't have any of the background or, you know, I couldn't answer that right now.

Q Okay, would it affect you on how you would say deliberate on any issues of fact, as far as the fact that the defendant faces the possibility of either life or death, in say, weighing some issue of fact that you might have heard from the witness stand? Would you place any different weight on it, just because there is a life-death situation involved?

A Not in this situation, I wouldn't.

Q Okay, I assume by your affirmative answer to the Judge when he asked you if you had any religious, moral or conscientious scruples against the death penalty that you did not?

A The only think I was saying is like it says, if a man takes another man's life where you get an eye for an eye and a tooth for a tooth. That is the only thought that came to my mind.

Q Had you formed – strike that – you had formed the opinion about the death penalty before you came here, am I right?

[p. 1042] A Yes, sir.

Q Could you tell me what your views were on that, on the death penalty and capital punishment?

A I think that it is a necessary part of our society. If it is not stopped now, crime will continue at the rapid rate it is going.

Q So, will I be correct in assuming that you feel that the death penalty or capital punishment is a deterrent to crime or that it would keep someone else from, say, committing some later conduct?

A I think it would.

Q Okay, do you have particular crimes or are there any particular offenses that you feel deserve the death penalty and others that do not deserve the death penalty?

A I feel like a rape charge or taking someone else's life would require a death penalty.

Q Okay, are you saying that because a person has been found guilty beyond a reasonable doubt to have taken a person's life, then that would automatically mean that that person should get death?

A Not automatically. I think, you know, I [p. 1043] wouldn't know all the facts, so I can't say automatically.

Q Okay, what type of facts would you want to know in reaching your decision on having to make a decision? What would you want to know, you, Mr. Killgore?

A I would have to know all of the background of the victim, know what his motives were, what state of mind he was in at the time of the robbery.

Q Okay, when you – excuse me. You had formed a conception of capital punishment before coming here, right?

A Yes.

Q Had you ever examined those issues or ever looked at those issues before you came to Court of – or those issues – are those issues new to you?

A Yes, sir.

Q After considering those issues, do you think that your opinion about capital punishment or the death penalty has changed or altered on how you would make that decision? Do you think that has changed?

A I think it has changed to a certain degree.

[p. 1044] Q. Okay, in what respect, please?

A In that you have so many different facts that you have to consider for the death penalty.

Q All right?

A And I realize that there is a lot more involved in it than just a man killing another man.

Q Okay, is that something that you feel now that you did not feel prior to coming to Court?

A Yes, sir.

Q Okay, so your conception of the death penalty has changed to the extent on how you would make a decision, am I correct?

A That it has, I think it has.

Q No whether you believe or don't believe on just how you would make that decision, right?

A Right.

Q Would you be able to weigh all of the facts and make a decision after examining the issues, each issue separately, weigh all the facts that you hear?

A Yes, I think I can make an intelligent decision on it.

Q Could you tell me, have you ever discussed your views on the death penalty with anybody else?

[p. 1045] A No, sir.

Q How do you think that you might have formed your views, I'm not asking you specifically, back in 1957 did you finally say, I want the death penalty, I'm asking you how you think you might have formed those opinions?

A Well, all –

Q Besides your father and friends?

A All the innocent people that are killed for no apparent reason, whether it is the defendant's fault or it might be aggravated, premeditated. It is something that you just have to think about before you make a decision on it.

Q Okay, and you have no problems with the issues involved?

A No, sir.

Q Okay, and you can go by the guidelines that have been established in answering those questions?

A Yes, I can.

Q You have no problems with that?

A No, sir.

Q Okay, going to special issue number one, would the fact that you have found the defendant or [p. 1046] you believe a defendant has been found guilty beyond a reasonable doubt, say, we have gone past the guilt or innocence, all right, you are satisfied in your mind beyond a reasonable doubt that the defendant is guilty, okay, would the mere fact that you have established that in your mind make you automatically answer the first part of special issue number one yes?

A After I have had all the facts, I think the whole question would have to be answered before I made a decision.

Q What I am asking you is basically, can you see the distinction or difference between the first part of special issue number one, that is different from the guilt or innocence phase of the trial?

A Yes.

Q Okay, and that just because you have found somebody or you believe beyond a reasonable doubt that they are guilty doesn't make you automatically answer number one correctly, the first part of number one yes, not correctly, but yes, okay?

A Right.

[p. 1047] Q All right, can you conceive of a situation in going to the second part of number one and with the reasonable expectation that the death of the deceased or another person would occur, okay, can you conceive of a possibility where a person's conduct did cause the death, okay, his conduct did cause his death, what he did, not

the actual killing, but what he did, did cause the death, okay?

A Right.

Q Can you conceive of a hypothetical situation and I will use this, where a person came in and he had a .357 Magnum and he came into the store to rob the teller who was behind the counter, and he came in and he did shoot that individual, okay, he did shoot that individual, that was his conduct, the shooting was his conduct, okay, but can you conceive of a situation, this possibility where he just fires in the general direction or in the direction of the shop owner, okay, and him not have a reasonable expectation that the death would occur, can you conceive of that possibility?

A Yes, like a warning shot or something just to [p. 1048] get their attention?

Q Let's not say it was a warning shot, let's just say that he meant to strike the individual, okay, he wasn't shooting a warning shot, he meant to strike the individual, but he did not have a reasonable expectation that the death would occur, can you conceive of that possibility?

A Not if he purposely shot at him, I couldn't see that.

Q Okay, you – using a hypothetical situation, where we are in a 7-Eleven and I'm the defendant, and I am the individual and I walk into the store and I have a .357 Magnum, and I come in and I point the gun at the shop owner and tell him to give me his money. He hands me the money. All right, I am leaving. Okay. If for whatever reason I turn around and fire, okay, now, if I come in and

point the gun at his foot and shoot, wouldn't you say that I had no reasonable expectation that the death would occur?

A If you pointed it at his foot, I would say that.

Q And if I came in and put the gun right at his [p. 1049] temple and shot, wouldn't you think that I did have a reasonable expectation that death would occur?

A Right.

Q Okay, so could you consider a possibility where a shot was just fired, not in any particular portion of the body, but the shot was just fired, can you conceive of that possibility?

A Yes.

Q Does that cause you any problems?

A No.

Q And if it was shown to you beyond a reasonable doubt that that did happen, that a shot was just fired, could you answer special issue number one no?

MR. HOBBS: Your Honor, I object to the form of that question as being improper under the circumstances set out by counsel.

THE COURT: Sustained.

Q ~~Can~~ you see the possibility where you go into the store, I go into a store, not you, but I go into a store, and I just fire the weapon in the direction, and I meant to hit, okay, [p. 1050] just fired in that direction, but I didn't expect the individual to die, can you conceive of that possibility?

A No, if you shot at him and meant to hit him, I can't see that you wouldn't think that he wouldn't die.

Q Okay, but if I point it at his foot?

A That would be a different situation.

Q Okay, going down to special issue number two, whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, in the context of that special issue, how would you define probability? How will you define probability?

A In issue number two, I would define it as whether the defendant would repeat the same crime or whether he would be a threat to his fellow man.

Q Okay, would you say whether it was likely?

A Whether it was likely that he wouldn't repeat another crime of that sort.

Q Okay, and wouldn't you agree with me that that is kind of like your hired to make a prediction in a sense, right?

[p. 1051] A Yes, sir.

Q You are going to have to kind of look in your inner feelings, plus looking at the defendant and whatever facts they have presented to kind of make a judgment, right?

A Right.

Q Okay, does the fact that you have – might have to make a judgment or predict the future in any way bother

you on the ultimate result of life and death of the defendant?

A It wouldn't bother me if I had all the facts of his previous history.

Q Okay, would you want to know whether or not he committed other acts of violence in the past?

A Yes, I would.

Q Would you want to hear testimony as far as whether he would commit other acts of violence in the future?

MR. HOBBS: Your Honor, I object to that as being improper in the way it has been phrased in its present status.

THE COURT: Sustained.

Q Would you want to know something about the individual's background?

[p. 1052] A Yes, I would.

Q Would that make a difference to you?

A Yes, it would, if all the facts were presented.

Q If all the facts were presented?

A If he was that bad.

Q When I speak of background, the only facts that are presented is what is said from the witness stand. If nothing is said from the witness stand about the defendant's background, then you cannot consider that, do you understand that?

A Yes, sir.

Q Okay, what you might have heard out in the hall about the defendant's background is not under your consideration. Do you understand that?

A Yes, sir.

Q Okay, so you would consider a person's background?

A Yes sir, I would.

Q And in considering a person's background, would you say that his environment had something to do with his background?

MR. HOBBS: Objection, Your Honor, as being irrelevant and immaterial to the [p. 1053] issue before the Court and the jury.

MR. THORNTON: May I have an opportunity to respond?

THE COURT: Yes, sir.

MR. THORNTON: The potential juror has already stated that he would consider an individual's background, and the individual's background is for and not inclusive on any particular point, and I think this is what I am trying to find out, what he would consider in a person's background.

THE COURT: He has answered that he would consider the person's background and it's repetitious, Mr. Thornton.

MR. THORNTON: I don't think so, Your Honor. Are you sustaining the State's objection?

THE COURT: Yes sir, sustained.

MR. THORNTON: Please note my exception.

Q (By Mr. Thornton) Would you consider a person's maturity?

A There is no way I can know how mature the person is.

Q If you had any evidence on that fact, would [p. 1054] you consider that?

A That might be considered, yes.

MR. HOBBS: I object, and I would ask the Court to instruct the witness that the aspect of maturity is not a consideration in that the law requires.

THE COURT: That is overruled.

Q You can consider that?

A Yes, sir.

Q Because in predicting a continuing threat to society, aren't we, in a way, having to make a determination whether or not a person's conduct will continue to be the same way it is then, wouldn't you agree?

A Yes, sir.

Q And in evaluating, and in evaluating a person on whether his conduct would continue to be the same way as it has been in the past, don't we need to know something about that individual?

A Yes sir, that is why I said I wanted to know the past history.

Q And in his past history, wouldn't you agree that trying to make a determination on how he would act in the future you need more than [p. 1055] just how he acted in the past?

A I don't understand how could I have more than how he acted in the past?

Q The probability, okay, what we are dealing with is probability in a very abstract term. It is something that is not concrete.

A How would I feel that he would act in the future is, is that true?

Q Right?

A Yes.

Q What else would you like to know or what else would you, as a juror, would you feel, as a juror, you would need in answering special issue number two, considering that a life, it is a life and death situation; looking at special issue number two?

A Probably have to know whether the defendant was willing to be rehabilitated.

Q Would rehabilitation come into your mind, into consideration, the rehabilitation?

A Well, I don't know unless this was the first offense, I would have to know all of the aspects of the whole thing.

Q You mentioned earlier the Biblical passage "An eye for an eye and a tooth for a tooth"?

[p. 1056] A Yes, sir.

Q In the context of what you know now and what you will be required to do as a juror, how has that altered your belief concerning that passage, or your feelings concerning that passage?

A I would have to know the degree in which the act of violence was committed, and in what state of mind.

Q Okay, and just for the mere fact that a murder has been committed wouldn't automatically make you vote for death?

A No sir, it wouldn't.

Q Okay, you would be willing to consider other factors?

A Yes, sir.

Q Okay, I see here that you have also stated that a member of your family was employed with law enforcement. You said he was a security officer. Who is that?

A I would rather not answer that question.

Q It would be pertinent, it would be helpful, there is no way I am attempting –

A I would rather talk to the Judge about it.

THE COURT: Obviously, we have to [p. 1057] evaluate your state of privacy. If you have someone who is related in law enforcement, the question we have to ask you is this, is the fact that you have a person whom you know or are related to who is involved in law enforcement, since there is that fact that you have that association, would it cause you to be unfair and lean more

favorable to one side or the other because you have someone that you know who is involved in law enforcement?

A Sir, it wouldn't have any effect on the way that I would answer the questions with all the facts that we have, but I would rather not answer that.

THE COURT: Well I am not asking you who it is.

A Okay.

THE COURT: Or what they are involved in. What I am asking you is we have told you at least fifty times during this interrogation we need someone who is fair and impartial?

A Yes, sir.

THE COURT: And who can be not only [p. 1058] fair and impartial to the State of Texas, but also fair and impartial to this defendant. Obviously, by virtue of the fact of someone that you know or whom you are related to that is involved as a security officer, possibly in some form of law enforcement, the issue becomes relevant because of that association. Would you tend to be more aligned with the State or would you give more credibility to the State's witnesses, merely because of the fact you know someone who is a security officer?

A Yes, I was a security officer.

THE COURT: You were a security officer?

A Yes, sir.

THE COURT: Because of the fact you were a security officer, would that tend to make you believe the State of Texas' witnesses more than a witness that would testify for the defendant?

A I don't think it would have any effect on it.

THE COURT: Okay, well that is obviously – let me take it one step further. I know absolutely nothing about the State's [p. 1059] case. I do not know who they are going to call as witnesses. I don't know if there are Houston Police Officers that will be called or any law enforcement officers that will be called. Because you were in the past a security officer, do you think that you would tend to give more credibility or more believability to the police officer, merely because of the fact that he might be a police officer?

A It might have a bearing on my decision.

THE COURT: It might have a bearing on your decision?

A Yes, sir.

THE COURT: Are you telling me, then, Mr. Killgore, that you would tend to believe a person, let's assume you have someone testifying the color of a car was black and that person was not a police officer, just an everyday citizen, aznd [sic] you have a police officer testifying that the color of the car was gray, so you have obviously these two very different pieces of testimony. My question is would you believe the police officer over the citizen merely because of [p. 1060] the fact that that other person was a police officer?

A No sir, I wouldn't.

THE COURT: All right, any further questions, Mr. Thornton?

MR. THORNTON: Just a couple, Your Honor.

EXAMINATION BY DEFENSE (CONT'D.)

QUESTIONS BY MR. THORNTON:

Q Mr. Killgore, my asking that question is not to pry and come back and release any information. It is purely as the Judge stated, I'm just trying to attempt to find out whether there is any inferences that might affect you as a juror, okay?

A Yes.

Q And I'm in no way trying to gather information from you to take to anyone else or anything like that, okay?

A Yes.

Q Approximately how long ago has it been since you were a security officer?

A Probably about 12 years.

Q Okay, was there anything bad about the [p. 1061] experiences of being a security officer that might affect you in this case, in being able to sit down as a fair and impartial juror in this case?

A No, I also have a brother-in-law that was in law enforcement at one time.

Q Okay, he is not in the law enforcement any longer?

A He is a private detective.

Q Okay, would you be able to make your own decisions and own determinations about this case and the evidence on your own independently?

A Yes.

Q Say if something came up in the middle of the night that you thought about, you wouldn't pick up the phone and say, call him and ask his opinion on it, would you?

A No.

THE COURT: Anything else, Mr. Thornton?

MR. THORNTON: Yes, sir.

Q Mr. Killgore, has the impact of your obligations met you yet? Has it come to you yet, the fact that you might be in a position in determining life or death of an individual, [p. 1062] has the full impact, that hit you yet?

A Yes, it has.

Q Okay, and you feel that you can be a fair and impartial juror?

A Yes, I can.

MR. THORNTON: I have no further questions.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: We will accept.

THE COURT: What says the defense?

MR. THORNTON: The defense will accept, Your Honor.

THE COURT: Mr. Killgore, will you stand and be sworn by the clerk?

(At this time juror sworn.)

THE COURT: Mr. Killgore, as you can tell from the nature of this process, this is a long process. You are juror number 6, and we have 6 more to go before – before the full testimony in the case will begin. We will anticipate that we will start testimony a week from Monday. We have a phone number you can be reached at. We can contact you at some point next week to let you know that [p. 1063] we will for certain start on Monday the 26th. The trial will actually be held in my courtroom, which is on the 4th floor of this building. If there is any reason for you to contact us, you may contact Mr. Pollinger, who is the bailiff, who escorted you over here this morning. I know by virtue of your employment with KLM, you may need something to show you have been on jury service. My clerk will give you this information and we will be contacting you next week to let you know when we will get started. You are free to go about your normal routine. You are excused at this time. See on the 26th.

* * *

[p. 1084] MR. DAVID GILROY, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Thank you for your patience. I know it has been a long day for you. I will try to be as short as we can be, but we have to take time because it is obviously a serious matter. I know that from looking at your juror information form you have had prior civil jury service, but not prior criminal jury service, is that right?

A That is true.

Q Was there anything I discussed with you this morning relative to the trial of a criminal case that I need to repeat or was there any problems to you this morning?

A I understand the difference between the two.

Q All right, sir, the thrust of what we wish to speak with you about this afternoon has to do with obviously your ability of serving as a juror in a capital murder case. As I told you this morning, the defendant, Mr. Graham, was charged with the offense of capital murder. [p. 1085] It is an offense that carries the possibility of the death penalty as punishment, and that is why I ask you individually and the 10 of you collectively to think about your personal thoughts and beliefs as to your feelings about the death penalty and whether or not you could participate in the jury verdict in which the death penalty was considered as punishment. Once again, we are not in any way trying to embarrass or pry. It is just we must know

the answers to these questions in order for us to determine if you can be a fair and impartial juror in this case. Mr. Gilroy, do you have, first of all, let me ask you this, have you formed an opinion one way or the other, not necessarily today, but in your past deliberations in your 29 years on this Earth, have you formed an opinion one way or the other, either for or against the death penalty as punishment in a proper case?

A I believe I am for it.

Q All right, sir, I take it by your answer, Mr. Gilroy, that you do not have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment [p. 1086] in a case that you thought was proper, is that what you are telling me?

A Right.

Q All right, sir, let me spend a little time explaining to you the nature of the proceedings in a capital murder trial, and then we will talk specifically about the issues. As I told you this morning, the burden in all matters in a criminal trial is upon the State of Texas. The State of Texas not only must prove to you beyond a reasonable doubt that the defendant is guilty of the crime that he is charged with, they must also prove to you beyond a reasonable doubt that the manner in which you answer special issues that are submitted to you should be answered in a form consistent with the Court imposing the death penalty as punishment. The State has the burden of proving to you that that is what your answer should be, and the State must carry this burden by presenting testimony that is relevant to at least two special issues that are presented on the punishment phase of the

trial. The jury, in response to whatever testimony is presented, answers these special [p. 1087] issues in their deliberations, and it is the manner in which these special issues are answered that dictate to me what punishment this defendant should receive. I know that you have had prior civil jury service so you are familiar with the concept of special issues. You received those before in your jury service. There is a further degree of similarity between the special issues in a criminal case and a civil case in the manner in which the number are required for a jury's answer. If the jury answers these special issues yes a unanimous verdict is required, just as the guilt verdict on the guilt or innocence phase requires a unanimous verdict, as does the not guilty verdict if you choose to vote not guilty. On the punishment phase if either of the special issues are to be answered yes, which ultimately means yes, the defendant should receive the death penalty, a unanimous verdict is required. If the jury answers or chooses to answer either special issue no a 10 - 2 verdict is required, which is synonymous with the verdict in a civil case. In answering the special issues, if [p. 1088] there is a vote of less than 10-2, the jury will be instructed to continue their deliberations until a verdict is reached. Again, principles applying to the civil case. Special issues are the State's burden of proof, once again, being beyond a reasonable doubt and the numbers that are required to answer the special issues and the fact that a set of yes answers result in the death penalty for the defendant, one or more no answers result in life in the Texas Department of Corrections. Those are the only two punishment alternatives. Do you understand?

A Yes.

Q The punishment phase of any capital murder case that reaches the punishment hearing will have at least two special issues. Those two special issues are pinned to the bulletin board, which is to your right. If you will take a moment to view those special issues and we will talk about them?

A All right, sir.

Q In special issue number one, we are obviously asking you to reflect upon the testimony that you have heard in the guilt or innocence phase [p. 1089] of the trial relative to the defendant's causing the death of the deceased. You must determine if the act which resulted in the death of the deceased was done by the defendant deliberately, number one, and did he have a reasonable expectation that the death of the deceased would result. So we are asking you to reflect back on that testimony. In viewing the phrases deliberately and reasonable expectation, I must inform you that there will be no legal definition provided by the Court. It is a matter of your common sense, and that is true throughout these special issues. It will not give you any definitions or instructions. That is contrary to the guilt or innocence phase, and I will give you the definition on instructions, and so you are free to interpret these terms in any way you deem proper. In viewing the term deliberately, I construe deliberately or his intent. A voluntary act on his part. It is contrary to accidental. By the same token it does not necessarily equate premeditated. In my mind, a person may do something deliberately, but not necessarily do [p. 1090] so in a premeditated fashion. Would you agree with that, sir?

A Yes.

Q Okay, secondly beyond a reasonable doubt, reasonable expectation of death. There are certain sets of facts that may cause you to answer this one way or the other. Let me say this initially. In our search for 12 people to be jurors in this case, we are hoping to find 12 people that will have an open mind when they view these special issues. There are those who feel that if a human being takes another human being's life, he should automatically receive the death penalty regardless of any mitigating factors, one way or the other. There are those who feel that another person's life should never be taken regardless, and could not impose the death penalty under any situation. We are seeking to find those who fall within the middle of the extreme. We are seeking to find persons who can assess the death penalty as punishment if they feel it is aproper [sic] case for it to be assessed punishment, but only do so after they hear whatever evidence or testimony is proper [p. 1091] on the punishment phase of the trial with regard to these special issues. Do you feel, sir, that you could have an open mind as to whether or not to vote to answers that would be consistent with life or death after all the testimony is presented and only to that point in time?

A Yes.

Q Let me give you two examples with regard to special issue number one that may bring about a different response from you. Assume with me that a person, a young man goes into a Stop and Go with a pistol and takes money from the Stop and Go and he does not intend to kill anyone. He intends to take money and has a wife and small child at home who are sick and cannot get money any other way, and he knows no one is going to

give him money. He goes in out of frustration, but does not intend to hurt anyone, and as he walks in the door, he slips on an apple that is left on the floor. He slips and the gun falls out of his hand and hits the floor and accidentally discharges and the clerk that is behind the counter is struck by the bullet as it is discharged and is killed. [p. 1092] The law would say that person very likely would still be criminally responsible for the offense of capital murder, however, you might view his actions when you would deliberate on special issue number one with regard to whether ornot [sic] he reasonably expected that the death of that clerk would occur. Would you agree with that, Mr. Gilroy?

A Right, there would be an argument.

Q You would see that he did not reasonably expect to kill that clerk. He expected to take money, but not to kill him?

A Right.

Q On the other hand you might have the cold blooded killing situation where he walks in with a pistol and guns the clerk down in cold blood, just out of sheer spite because he is an evil person and in that situation you very well might answer that yes, I think he did it deliberately and he reasonably expected to kill that clerk. So, you see there are many situations that fall within those extremes that would require your deliberation before answering that special issue. Special issue number two deals with your being called upon [p. 1093] to predict the future in some respect. We are asking you to view the conduct of the defendant in this case in which you found him guilty. We are asking you to view what other relevant

testimony is presented for you to determine if the defendant will probably commit criminal acts of violence in the future that would constitute a continuing threat to society. There are items that would be pertinent to you answering this question. Not only the facts of the case that you have considered on the guilt or innocence phase, but also a prior criminal record, if any, by the defendant, whether or not he committed any other crime, any other criminal offenses, what other people in his community say about him, either good or bad, and that very well might be a situation that you are dealing with a person who has 40 prior convictions to the other extreme does the person who has never been in trouble before and everyone in the community thinks he is a saint. So once again, we are dealing with varying situations, and the end result is that we must have 12 people who hear those varying situations before [p. 1094] making an answer. Would you agree to do that, sir?

A Yes.

Q Okay. Once again, I will not give you a definition of probability. You are a construction estimator, therefore, you probably work with statistics in some variation. You may view probability as being 51 or more per cent. In my mind probability means more likely than not. You may view it as a higher statistical fraction, but that is my definition, but you are the possible juror, not me. But once again, the upshot of this discussion is that you must use your common sense. Would the defendant probably commit criminal acts of violence. Acts of violence, once again, are very broad groups that range from the Class C assault offense of touching another person and that person finding it offensive to the other end of the spectrum,

which is the capital murder offense, and all the crimes in between, be they assault against persons, aggravated robbery, rape, kidnapping, crimes against property, criminal mischief, someone pouring paint on your car as it sits [p. 1095] in the parking lot right now. That is a criminal act of violence. There are a broad range of crimes that fall within that general category. And thirdly, would these crimes, the likelihood, this defendant would commit these crimes to the degree that he would constitute a continuing threat to society or ongoing threat to society; calling upon you to, as best you can, as a layman to predict the future as best you can. Those two special issues are presented in the punishment phase of every capital murder trial. There is a possibility, if raised by the evidence, that a third special issue may be presented to the jury on the punishment phase. The other two definitely will be presented on the punishment phase. The third is a possibility. If you will take a moment to ready that on the board. The first phrase that is important is if raised by the evidence. It can be raised by the evidence by one line of testimony. It doesn't require the testimony of 20 witnesses. One line is sufficient to raise it. If raised by the evidence, did the conduct of the defendant in [p. 1096] taking the life of the deceased, was it an unreasonable act by the defendant in response to the deceased's provocation to the situation. This issue presents personal difficulty to me in understanding what it means. This is what I believe it means. All of these special issues are admitted to assist the jury in deciding if the person should live or die. This issue is not presented to in any way excuse what the defendant has done. He obviously has done a horrible thing in taking the life of another

person, but our law says that if the person whose life has been taken in some way contributes to his death by adding provocation or contributing to the provocation in the situation, you may, as a juror, consider that in your assessment as to whether or not he should live or die. And if you feel that the person who is killed contributed to the total situation to the extent that the defendant, in taking his life is not acting unreasonably, then you would answer the question no. We do not feel that or I do not feel that the defendant acted unreasonably in taking the life of the deceased [p. 1097] because of the deceased's provocation, to be added to the situation. Once again, this is not a self defense issue. The defendant cannot claim self defense because he has provoked the difficulty in the first place by walking into that store with a loaded pistol, but we are viewing the situation here where the person who was killed added to the fuel, poured the fuel on the flame. Assume a situation where a person whom I talked about walking into the store and not intending to kill or hurt, but just to rob, take some money from the clerk and is on his way out without harming anyone, puts the pistol back inside his pants and is walking out. The clerk pulls the pistol from under the counter, hits the defendant in the back and in an act of self preservation, the defendant [sic] the pistol from his belt and fires at the clerk because he knows the clerk will kill him if he doesn't shoot the clerk first. He can't claim self defense, but you can see that the clerk, by his actions, has contributed. We are not applying any criminal responsibility to the deceased to the fact he is killed, we [p. 1098] are not in any way absolving the defendant of guilt for the act that he has done, but we are presenting this to you as a manner in

which you can, if you feel it is proper, punish the defendant by life in the penitentiary, as opposed to death. It is more or less an issue of mitigation. It is not an issue of justification, but mitigation. Do you understand what I am driving at?

A Yes.

Q Obviously, it kind of does contrary to our beliefs that a person has a right to defend his property, and we are not condoning what the defendant has done in taking the person's life, but what we are doing is saying consider the deceased's conduct in determining whether or not in light of that provocation, if any, the defendant was unreasonable in taking the life of the deceased, not justification, but mitigation. You understand the concepts, sir?

A Yes.

Q Have I said anything up to this point, Mr. Gilroy, that you do not understand or require any further explanation?

A No.

[p. 1099] Q All right, I know, reflecting back for a moment upon special issue number one there are other fact situations that might be presented with regard to the phrase reasonable expectation that the death would occur that I want to cover briefly. In regard to the hypothetical situation that I gave you, there might be a situation where a person might walk into a store, planning to rob and then as I said in my last hypothetical, it may change to where he does take a person's life that he did not reasonably expect to take that person's life when he walked in the store in the first place, and in regard to that, this

might be a situation where the person fired the pistol and shot a person or defendant fired the pistol and shoots the clerk in the foot to stop him running after him, but he doesn't reasonably expect that the clerk is going to die by a gunshot wound in the foot. The clerk falls and hits his head on the edge of the counter and dies, and the person that shoots him is still guilty of the offense of capital murder, but it is not reasonable to expect that he expected that person to die. [p. 1100] Do you understand that, sir?

A Yes, sir.

Q I think that concludes all the comments. I trust that both sides will be as brief as they can be in the interest of the house. Mr. Hobbs, the Assistant District Attorney, will have a chance to speak with you, and the [sic] Mr. Thornton for the defense. Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Good afternoon. I am Carl Hobbs, and I am an Assistant District Attorney assigned to prosecute in this case. The gentleman that was behind me and got up is also an Assistant District Attorney, Mr. Mike Addudel. This is Ms. Northcutt, a law student that is working with our office as a part of her studies. Basically, the Judge has talked a lot about legal concepts. I am going to try to cut my time down some, sir, but there are things I am going to have to talk about. The State has the burden of proof. That is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it was beyond [p. 1101] all doubt, I think you would agree that you would have

to have been there to see what happened. If you were there, you would be a witness, and not a juror. Any problem with that concept?

A No, sir.

Q There is conflict here – two sides. We are in the courtroom. If there weren't conflict, we wouldn't be here. Conflict, in and of itself, is not reasonable doubt. Your job, as a juror, is to resolve conflict, to decide which witnesses you choose to believe, all of their testimony, if you choose, only to believe part of it or if you want to, absolutely none of it. The State's burden as to beyond a reasonable doubt is to the elements of the offense. Those elements and only those. We don't have to show the defendant had a particular motive. We don't have to show what his particular mental condition or schooling, social status is or was at the time. We do have to show that he did an intentional act. I can't go into a person's mind and tell you what he is thinking about. I can show you what he did and what he said or if he just did [p. 1102] an act, actions alone will show one's intent. Actions and words, possibly or words alone or a combination thereof. Any problem with that, sir?

A No.

Q Now, those – the things that the State must prove in the first – we are talking about the first part of the entire trial. That is the guilt or innocence stage. And needless to say, if the defendant is found not guilty, we don't even talk about punishment. We don't get that far. The State must prove that it was the defendant, Gary Graham; that the offense occurred in Harris County, Texas; that it was on or about May 13th, 1981; further that

the defendant, while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert, by shooting him with a gun. Bobby Grant Lambert, that is. That is what the State has to prove beyond a reasonable doubt. Not what color pants or shirt or what color the sky was or how many cars were five blocks down the street. It is irrelevant and [p. 1103] immateral. It is whether or not those elements have been proved beyond a reasonable doubt. As an example, also prior to getting to that, the State must – under our law, an individual, when you reach the age of 17, you are an adult, subject to the entire range of penalty as any other adult for the laws and violations thereof. My question to you, sir, is: Would the mere age of an individual, whether that individual be young, very young or very old, yet in the classification as an adult, affect you to the degree that you would automatically, even though the State has proved the case to me beyond a reasonable doubt I'm not going to find this person guilty because they are too young or too old?

A No, I don't think that would make any difference.

Q You would look at the fact situation and decide whether or not the law had been violated and whether the State had proved it to you beyond a reasonable doubt?

A Yes.

Q I want to use an example that I would ask a question about, sir, that in relavance [sic] to the [p. 1104] guilt state, and also into – that – well – discussing special issues in the punishment phase, let us presume, sir, that

this room is a 7-Eleven Store, and that the following people are present in the store, okay?

A Okay.

Q Let's say that you are a person that is present in a relatively same position that you are now. Let's further say that there is a partition or blockage of some type as the Judge's bench is and also Mr. Pollinger is there, who is sitting down at the end. The bailiff, as you saw when you came in. You can't see him or you can only see parts of him?

A Yes.

Q Mr. Pollinger is working the cash register and it is near the end of the shift, and he is taking the money from the register for the day, he puts it in the bank bag, slips it in the coat he has on with part of the bag sticking out, and furthermore, he is restocking for the day and he has a box in his hand, and he is putting things in behind the register area, in the shelves there. [p. 1105] Furthermore, let us presume that Mr. Mock is also present in the store, and he is sitting in this area in say about the same position that Ms. Northcutt would be. He is there. Furthermore, let Mr. Thornton – he is there, in an area such as he is here where he can see everybody that is concerned, and there is a partition, something similar to this inside of the store back of which Mr. Mock is. Further presume that I am the robber. I am going to be a robber. I come into the store, and I approach Mr. Pollinger, and I see the bank bag sticking up, and I can see it has something in it, and I know it is about shift time to end, and I'm going to take it. I approach. He is – he has a box and he is putting things on the shelves, and as I approach and

reach for that bag, he sees me and he turns, and I grab him, and when I grab him I come up with a pistol. I stick it next to his head, and about that time Mr. Mock sees the pistol, exercising some self preservation and good sense, dives down. He saw the pistol, but he can't describe me. No way. Other than what my race may be, or something of that [p. 1106] nature. Mr. Thornton is looking where he is at now in the situation we have described, sees me with the pistol next to Mr. Pollinger's head and hollers and when he hollers I turn and look at him, and Mr. Pollinger turns back and I turn and kill him, Mr. Pollinger dead, and I leave. You hear somebody going someplace, but you didn't see it. Say I am caught later on. I'm being brought in and I am being tried for capital murder. You are a juror. They didn't get a gun off me. They haven't got any property that I may have taken from there, and I didn't leave any fingerprints on anything inside the store. You believe that the State has proved to you that first of all, Mr. Pollinger was shot and killed with the gun during the course of a robbery, that it occurred in Harris County, and it was on or about a specific date. Now, the question is who did it. Mr. Thornton takes the stand and testifies. He said I saw Carl Hobbs, that man sitting in this chair, shoot and kill Mr. Pollinger during the course and commission of that robbery. My question to you, sir, is if you believed all those [p. 1107] other factors, all those other elements have been proved and further that you believe beyond a reasonable doubt the testimony of Mr. Thornton, that I am, in fact, the robber, could you based upon the testimony of a single eyewitness, find an individual guilty of the offense of capital murder?

A Yes.

Q Okay. Now, let's go further. Now in the course of committing theft, we are talking about robbery, and we talked about robbery in the State of Texas can be committed without any property being taken. I can come up to you and pull a gun and an officer can come up behind me, you know, I demanded your property and he can come up behind me and say drop it, well, I have committed aggravated robbery, and I haven't gotten anything. I can start to take your pen and you jerk back and I shoot and kill you in the course of taking. In the course of committing theft means in an attempt to commit, during the commission of it or in the flight after the attempt. Now, you have been found guilty of capital murder, and we are going to go to consider special [p. 1108] issue number one. Basically, as you have gone over it with the Judge, you know by its very definition and by its very wording that you must look at the evidence of the fact situation that existed in the first phase of the trial in order that you can answer that first special issue. Okay?

A Okay.

Q You have decided whether the act, my actions, I committed the conduct of the defendant, that caused the death of the deceased was committed deliberately. You have to decide whether me pulling the gun, putting it up next to his head, him breaking away and me shooting him was a deliberate act on my part. Then you have to consider whether there was a reasonable expectation that the death of the deceased would have occurred. Say, in the instance – furthermore, say I hit that individual in the chest when he was shot. That is, I think you can see that my actions may have been deliberate, depending on

where the bullet hit and where I shot, a reasonable expectation that death would occur. Now, if I shot you in the foot, I deliberately shot [p. 1109] you in the foot, you know that could change. I shoot you in the head, a shot to the chest, it changes, but based upon the evidence in the case and the State still has that burden of proof beyond a reasonable doubt as to those facts, okay?

A Okay

Q We still get a look at it, but you have to consider these two points. Move down to the next special issue, what does deliberately mean to you, sir?

A On purpose.

Q Willful or voluntary act. It is not an accident, and it is not reasonable expectation, just common sense, and you have to look at the fact situation, fitting it in as to the actions of the parties involved. Now, special issue number two. Probability is not defined. The Judge has told you what constitutes a criminal act of violence. Anything from breaking that clock on the wall, somebody else's property, slashing the tires, slugging you in the face, robbing you, rape, murder, capital murder, criminal acts of violence. Probability. Probability is not [p. 1110] defined. Likely. More than likely. Possibly. You have a definition that you are fond of, sir?

A For probability?

Q Yes, sir?

A I don't know. What you said.

Q A criminal act of violence that will constitute a continuing threat to society. When we are talking about a

society, I want you to view society in a very broad concept. In fact, society means all people that you come into contact with. In this instance, would you agree that individuals that are confined to penal institutions are also part of our society? They are there, but they are part of our society?

A True.

Q Furthermore, that the guards or the prison officials that are working there are members of our society, so when you are asked, the criminal acts of violence that will constitute a threat, a continuing threat to society, to consider those folks, too. Now, here special issue number two, I think you can see could possibly be answered by answering based upon [p. 1111] just the fact situation that existed in the act, the evidence that was presented. But in most instances this special issue number two allows the Judge to, for both sides or either side, but primarily the State, since the State has the burden, the defense does not have to do anything to bring evidence and the Court can allow evidence that is – that the Court deems permissible in that stage to aid a jury in answering that question. That could consist of, it doesn't have to, prior criminal records, if any, other criminal acts of violence, if any, reputation witnesses, if any. I think it is conceivable that one could believe that he will come in and say he was good or has been very good. I can't understand why he did it this time or they can come in and say he is terrible and he has also done it before, but once again, you can see –

MR. MOCK: We would object to that misstatement of the law as to reputation. That would only be allowed as to his reputation being good or bad.

THE COURT: That is sustained.

Q When we are looking at special issue number [p. 1112] two, other evidence other than just the mere fact can be presented to aid you to answer whether or not a probability, whether that person – I can't tell you definitely it's going to occur, but you can judge based upon the evidence before you. Do you have a problem with that concept?

A No.

Q Now, special issue number three, if it is raised by the evidence. Here, we are talking about, let's go back to the example that I posed there, for purposes of discussion on this. Now, the question is was whether or not the conduct, since I'm the one that committed the crime, whether my conduct was unreasonable. That is a question that you have to judge. My conduct. Why was the conduct – the first thing you have to do is ask in that instance what did Mr. Pollinger do. You ask yourself what did he do, if he did anything. First, if he did something, then you next have to decide whether or not if this issue, whether it was provocation, if any. You could say that he did something, but you don't have to agree that it was [p. 1113] provocation. Then whether you say it is provocation or not, let's assume that you said that it was provocation, if you said – decided well, that was something or he did this may or may not be provocation. Well, if he did that was the reaction that I did in relation to what he did, was my actions unreasonable and an unreasonable response to that action on the part of Mr. Pollinger before I killed him. In a situation there, you have to ask yourself what, in the part that I gave you, he was

holding the box and I tried to grab other things. He turned. I grabbed him and pulled the gun up. He broke away and I shot and killed him. You would have to ask yourself whether or not that was provocation, whether or not the actions was unreasonable, what I did, the shooting of him, was it unreasonable. Let's change the fact situation there to get an extreme context, okay?

A Okay.

Q Let us say that I got the money out of the coat pocket, that I got to the door, and I had my back to him, and he shot me and hit me [p. 1114] in the arm, and I'm almost out the door. I am almost out the door. I get back up and I haven't drawn my pistol, and he shoots me in the leg, and I see him coming. I'm down on the ground. I see him coming with the gun, and I pull my gun and shoot and kill a man. I'm still not absolved from the offense I committed, but I think it is an extreme contrast there and the actions, what, if anything did I do, was it provocation. What did I do? What did Mr. Pollinger do, and was my reaction to whatever he did unreasonable. You may or may not in the extreme situation there, may find one way or the other, anything in between. So you look at the fact situation if it is there, but once again, it will – it's a judgment, individual judgment of the jury, whether or not the act was unreasonable and if the action on the part of the deceased was any provocation whatsoever. Okay?

A Okay.

Q Sir, is there anything that I have failed to ask you that you feel that you would like to ask about or get some clarification on?

A No, I don't believe so.

Q [p. 1115] And in the proper situation, knowing that your answers, if you answered special issue number one and number two, which questions always will be submitted, let's assume all three were submitted and answered yes to all three and you know that those yes answers and that the proper answer to each one of those special issues was yes, because the State had proven to you beyond a reasonable doubt on the evidence that was presented, knowing that that result would – that those three yes answers would result in the death penalty, could you render those yes answers, knowing that the death penalty would ensue?

A Yes.

Q No matter what the age of the individual?

A Yes.

MR. HOBBS: Pass the witness.

[p. 1116] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q Good evening, Mr. Gilroy. I realize the lateness of the hour, and I only have a few questions I want to ask you. I noticed you were born in Illinois, and you eventually moved to St. Louis. Approximately when did you move to St. Louis?

A Since I was a year old.

Q I also noticed you went to Desmond High School. This was in St. Louis, and that is a catholic school, is it not?

A Yes, it is.

Q You have been in Houston approximately 4 years, right?

A It will be five in January.

Q Five in January?

A Yes.

Q And you are in architecture. How long have you been in that field?

A I started out in college in architecture and took a year and a half and eventually switched over to construction and graduated in construction.

Q [p. 1117] I'll assume, and being from St. Louis, myself, I assume you went to Washington University, based on the architectural school?

A Right.

Q You have never served on a criminal jury before?

A Correct.

Q Okay, so this experience is rather new to you, wouldn't you say?

A Yes, it is.

Q Could you tell me what your first impressions were, your reactions were when you received your jury summons?

A I didn't – it didn't bother me. I think I had the civil case about a year and a half and I was called about seven or eight months ago for another criminal court, but wasn't selected for a jury, so it has been coming pretty regular, I guess.

Q But under the concept of our laws as far as reasonable doubt and the presumption of innocence, you have no problems with those?

A No, sir.

Q And you also understand what is and what is not evidence, in the sense that only what [p. 1118] you hear on the witness stand from the witness stand is evidence, correct?

A Right.

Q Could you tell me, please, sir, your views on capital punishment and the death penalty?

A I agree with it, but I am not very pro capital punishment or totally against it. I think it depends on the circumstances.

Q Okay, in the proper case you feel it is right?

A Yes.

Q It is a necessary penalty?

A Yes.

Q Do you feel that based on what the individual did or do you feel that, say, it would be a deterrent to somebody else's committing some later conduct?

A I think there is some of both there.

Q Okay, I mean your feelings are some of both is that what you are saying?

A Right.

Q You feel in some instances it may be deterrent to somebody else committing a similar crime?

A I think the capital punishment, it is not a particular case, but capital punishment, it does act as a deterrent to other people to [p. 1119] commit those crimes, stop them.

Q And you would calssify [sic] murder as one of those crimes?

A Murder in the proper circumstances.

Q How long have you had those beliefs? Have you ever felt that you were not against the capital mpunishment [sic]?

A No, I don't believe so.

Q So, it is just something that has evolved over a period of time?

A Yes.

Q Okay, would the mere fact you would have to sit on a capital murder case affect you on how you would deliberate on any of the issues that might be brought before you, say, just because somebody faces a possibility of death, would you, say, weigh something less or more?

A I don't believe so. The case, I'm sure the case is important, no matter what the punishment.

Q So regardless of whether or not the person, say, is charged with theft and the person is charged with capital

murder, and you would still weigh the evidence that was presented to you the same, just the mere fact the severity of [p. 1120] the penalty wouldn't cause you to weigh it any differently?

A No one way or the other.

Q Okay, do you believe you could sit down and be an impartial juror?

A Yes.

Q Do you feel you would be able to divorce your emotions on how you personally feel, your emotions on being able to deliberate on the facts and circumstances being brought before you?

A Yes.

Q Do you have no problems with that?

A No.

Q Okay.

MR. THORNTON: Pass the witness, Your Honor.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the defense?

MR. THORNTON: We will accept, Judge.

THE COURT: Mr. Gilroy, would you stand and be sworn as a juror in this case.

(At this time juror sworn.)

[p. 1121] THE COURT: Mr. Gilroy, this will conclude your service at this time on this particular case. As you can tell you are the 7th juror in this case. We have five more, plus one alternate to select before we begin. We anticipate this will be completed next week, and we anticipate that the testimony in this case will begin on the 26th, which is a week from Monday. We further anticipate that it will take one week to dispose of the case. I am just telling you that for the purposes of notifying the company you work for. There will be no need for you to run to the courthouse until you are summoned or informed by Mr. Pollinger as to when the Court – when the trial of the case is going to begin. The trial will not take place in this courtroom, but in my courtroom, which is on the 4th floor of this building. We have phone numbers for your home and your business, if either of these change, or we need to locate you somewhere else, if you would call Mr. Pollinger and inform him as to those changes?

JUROR: That will be fine.

[p. 1122] THE COURT: We will contact you in the middle of next week to reassure you that we plan to start on the 26th. With that, you are excused, and if it is necessary for you to show anything to your employer to show you have been here, the clerk, will provide that for you. Thank you very much.

No. 91-7580

In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Petition For Writ Of Certiorari Filed March 9, 1992
Certiorari Granted June 8, 1992

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* * *

[p. 1124] October 19, 1981

MR. BOBBY J. PRYOR, called as a prosepective [sic] juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Good morning, Mr. Pryor. We're sorry to have you inside on a pretty day like today. We will take as little time as possible. I know it has been an inconvenience, the time you spent up here already, but we will have it concluded this morning. It has been two or three days now since we have spoken as a group Friday morning with regard to certain principles that apply in the trial of a criminal case. I notice from looking at your information form you served as a civil juror before, but you never served as a criminal juror, is that right, sir?

A Yes, Sir.

Q There were a lot of things I went over Friday morning that I want to make sure you have no problem understanding them and applying them if I gave them to you as the law, if you serve as a juror in this case. We talked about the fact that the defendant is presumed innocent [p. 1125] until he is proven guilty. The State has the burden of proof in a criminal case, and must prove to you beyond a reasonable doubt that the defendant is guilty to each element that is alleged in the indictment. That the indictment that exists against Mr. Graham is not any evidence of guilt, the fact that he is present in our Courtroom does not indicate to you any evidence of guilt

on his behalf. He is presumed innocent until proven guilty. That if the case is presented and you serve as a juror that the Defense has the right, that is guaranteed by law to the defendant, that the defendant does not have to testify or present testimony in his behalf. If he does not testify or present any testimony, you can infer no guilt from that. We also talked about the order of trial in a capital murder case, and that the trial in a criminal case and unlike a civil trial, there are two different phases. The first is the guilt or innocence phase. It is then at that time you only decide if the defendant is guilty or not guilty of what he is accused of, and if you find him guilty and only if you find him guilty do you go to the punishment phase, [p. 1126] and it's at that time that you decide whether or not what punishment should be. Do you have any problems understanding those concepts, Mr. Pryor?

A No.

Q Okay, as I told you Friday, the defendant, Gary Graham, is charged with the offense of capital murder, and that means that if he is convicted and the jury must deliberate on punishment, his fate, the jury can only return one of two verdicts on punishment. They can either assess his punishment at life in prison, in the Texas Department of Corrections or they can assess his punishment by death by lethal injection. It is hard to talk about something like this early in the morning, but it is a fact that if he is convicted, he could possibly get the death penalty, and both sides, as I told you Friday, when I asked you to think about your feelings about the death penalty as punishment, are very interested and concerned as to your feelings, because we want twelve people who serve on this jury that are qualified jurors. We do not want

twelve people who say because you have taken somebody's life you [p. 1127] automatically should get the death penalty because there are many cases in this Courthouse in which a person's life has been taken, but the death penalty is not a possibility. The death penalty is a possibility in this case, as I told you, because Mr. Graham is accused of taking another person's life while he was in the course of committing a robbery, and by virtue of the fact that there is an allegation of two felonies joined together, this creates the possibility of the death penalty as the possible punishment. So the question that I have to ask you to begin with, Mr. Graham – excuse me, Mr. Pryor, I'm sorry, is whether or not you have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment in a case you might deem to be proper? Do you think that you could serve as a juror in a case where the death penalty was returned as punishment?

A Yes, Sir.

Q Okay, so what you are telling me, then, is that you have no religious or conscientious or moral scruples against imposing the death penalty in a case you feel to be proper, is that right, Mr. [p. 1128] Pryor?

A Yes, Sir.

Q Okay, when a juror deliberates, Mr. Pryor, on whether or not the death penalty is the proper punishment in the case, they don't do it by the Judge sliding a blank piece of paper under the door and writing life or death on it. That is not the way it is done. The jury communicates its answers to the defendant as to what the punishment should be by the way they answer special

issues. If you had civil jury service before, you know what I mean because that is what is submitted to you in the Court's Charge on a civil case. Do you understand that, sir?

A Yes, Sir.

Q It's the way that the jury answers the special issues that determines whether or not the defendant gets life or death on the punishment phase of the trial. Once again, this is only if you find him guilty of capital murder. If you find him not guilty, you don't even consider any special issues. He walks out the door, just like you and everybody else does. But those special issues that I am talking about are pinned up on the bulletin board up here to your [p. 1129] right, and right now I only want you to be concerned about the first two. If you take a moment, Mr. Pryor, to read those first two special issues, and then we will talk about what they mean. I see you went to B. C. Ellmore High School. Did you go when Greg Pruitt was there?

A I was on the team when I was a sophomore and he was a senior.

Q He was mighty good even then. Let me ask you a few questions about – or let me strike that. Before I ask you any questions, let me do a little bit more explaining abut how the special issues work. Once again, Mr. Pryor, you only consider these special issues if you get to the punishment phase of the trial, and the State has the same burden improving to you that the death penalty is proper by the way you answer these special issues as they have the same burden on the guilt or innocence phase of the trial. The State must prove to you beyond a reasonable

doubt that the defendant is guilty, likewise, the State has the burden of proving to you that the answers to these special issues should be yes and that the death [p. 1130] penalty should result. There is no guessing game for the jury when they go back to deliberate upon punishment. The jury knows by the way that they answer these special issues what the punishment will be. If they answer at least the first two special issues yes, if the answer is yes to both of these special issues, the defendant will get the death penalty, and there is no way I can change the jury's verdict if the jury votes in the manner that the defendant will get the death penalty. I can't change that. I can't say that he ought to get life and change it. Likewise, if the jury votes to give the defendant life, I can't change it to give him death. I do what the jury tells me, okay, do you understand that?

A Yes.

Q If the jury is to answer either or both of these special issues yes, it must be a unanimous verdict. All twelve would have to agree that the answer should be yes, okay?

A Yes.

Q If it's to be a no answer, it's like it was when you were in that civil case, if it can be a [p. 1131] ten – two vote, if the jury feels there should be a no answer to either of these special issues, there must be a vote of at least ten saying it should be no, okay?

A Yes.

Q No on the first special issue we are asking you whether the conduct of the defendant that caused the

death of the deceased was committed deliberately and did he reasonably expect that the death of the deceased or another person would occur. Now, obviously, in looking at this issue, we are asking you to go back and think about the conduct of the defendant in which he took the persons' life that he killed. Okay, you can see that because I'm asking you about the conduct of the defendant that caused the death of the deceased, we are asking you to think back to the testimony that you have heard on the guilt phase of the trial. We are asking you two questions about that conduct. Number one, in killing the person that you have convicted him of killing, did he do that deliberately and number two, did he reasonably expect that he was going to kill that person. So you see in my mind, those are the two key [p. 1132] phrases to that issue, and one other thing I want to tell you about these issues, Mr. Pryor, is that I won't be giving you any definitions about these words, you will be using your common sense, what you believe these words to mean. When I think of a word, deliberately, and a person committing a deliberate act, I think that if the person intended to do what he did or his objective or conscious objective to do what he did, and he went ahead and did it, just like when the Bailiff called you to come in to the Courtroom and you walked in and you sat down in that chair, you intended to walk in and sit down in the chair. It was a deliberate act on your part. It's like you tripped on the table and just happened to fall in the chair. You intended to do that. The same thing kind of holds true in this first special issue. When you think about the defendant taking the life of the deceased, did he take that person's life deliberately. Did he do it on purpose? Not

did he do it in a premeditated fashion. Did he think about it for weeks before it took place, but did he intend to do what he did, and number two, did he reasonably expect that he was going [p. 1133] to kill the person that he killed. Was it an accident that resulted in that person's life being taken or did he reasonably expect that it was going to be done that way. Let me give you a couple of examples that I think may show you that there may be different ways that you answer this issue. Assume with me that somebody walks into a Utotem Store, and the person walks into the store intending to rob the clerk, but not to do any harm to the clerk. He just wants money. He doesn't want to hurt anybody. He walks into the store with a pistol and knowing that he needs the money did not, did not intend to hurt anybody, and he slips on a wet piece of floor right in front of the door and the gun flies out of his and he falls on the floor and the gun hits the floor and the gun goes off and the bullet hits the clerk and the clerk dies. In looking at that, you might say I think the fact that he went into the store, but he didn't intend to kill that person that he killed, he didn't reasonably expect to kill that person, he went in to rob and not to hurt anybody, you see, you might answer that situation no, that he didn't reasonably expect to kill [p. 1134] the person that he killed. Would you agree with that, Mr. Pryor?

A Yes.

Q On the other hand if he walks in with a pistol and guns the clerk down in cold-blood, you might say he did it deliberately and he reasonably expected to kill that clerk. Do you see the difference I'm driving at?

A Yes, Sir.

Q Do you have any problems understanding what we talked about so far?

A No.

Q So, assume with me, Mr. Pryor, that you have answered that question yes, you believe after going back and thinking about the testimony that was presented to you in which you were convinced that the defendant took the life of the deceased, he did it deliberately and he reasonably expected to kill that person, we then move to the second issue, and in the second issue we are asking you if there is a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society. Once again, I won't be giving you any definitions as to what these words mean, but [p. 1135] I am asking you more or less to review the facts that you had in this case and what other evidence is admitted to you in the evidence and for you to look into your crystal ball and into the degree this special issue requires predict the future in this person. We are asking you if it is more likely than not, if there is a probability, is it more likely than not that the defendant is going to commit criminal acts of violence in the future that will be a continuing threat to society. There is a broad class when we talk about criminal acts of violence. It could be anywhere from somebody walking up and punching you in the back in a way that you might find offensive. That is a Class C assault on one end all the way to the other end of capital murder. There is a lot of other crimes in between: rape, robbery, assault, even property crimes of violence. If somebody takes a screw driver and goes from one end

of your car to the other end and tears up the paint job, that is a crime of violence, also. So those are all different crimes of violence we are talking about, and whether or not the defendant will probably commit those acts of violence to the extent that [p. 1136] he will be a continuing threat to society. Do you understand what we are talking about?

A Yes, Sir.

Q Okay, once again, I won't give you definitions as to what those mean. There is other evidence that can be presented to you if it is proper. You know, you can consider the facts of the crime, you can consider any past criminal record the defendant has, you can consider any other crimes he may have committed, you can consider what other people in the community said about him, if they say he is a good person or a bad person, and all that, you can consider in saying how you want to answer number two. Once again, if you decide answer yes, all twelve of you must agree that it should be answered yes. If ten or more of you decide it should be answered no, then it is answered no. A no answer to any of those means life in the penitentiary. All yes answers mean death. Do you understand that, Mr. Pryor?

A Yes.

Q Any questions about what we have talked about so far?

A No.

[p. 1137] Q Okay, now, in the trial of a capital murder case, in the punishment phase, and that is what we are talking about right now, you will always get those

first two special issues. They would always be there on the punishment phase, the second half of the trial in a capital murder case. There is a possibility that there may be a third special issue in this case, and that is the special issue at the bottom and is attached to that board. If you will take a moment to look at that and I will spend some time talking to you about that because I think number three is a lot more confusing than the first two. In looking at that third special issue, Mr. Pryor, the first thing that it says that is important is if raised by the evidence. You will remember from your prior jury service that you are told by the Judge that the only evidence that you can consider is testimony that comes from the witness stand, like when those witnesses testified in that other trial you had or some type of written documents or photographs. And our law says if it is raised by the evidence, if there is just one line of testimony, it doesn't have to be [p. 1138] three witnesses saying the same thing. It doesn't have to be a half day's worth of testimony. Just one line of testimony, and if that one line raises the issue, raised by the evidence, then special issue number three calls upon you to compare the acts of the defendant and the acts of the person who was killed before he was killed, and we are asking you to compare their conduct in one particular way. We are asking you did the person that was killed, did the deceased do anything to help provoke the situation or add to or contribute to the fact that he was killed. That is difficult to understand because we are not saying that a person who has been convicted of capital murder, of walking into a store, possibly committing robbery and shooting the clerk has a right to self-defense. We are not saying that, because that person walked in the store and

robbed the clerk, started off the difficulty or brought about the problem. By provoking the difficulty he can't claim self-defense. He can't claim it was the other persons' fault. Do you understand that, sir?

A Yes.

[p. 1139] Q However, if the other person who was killed in some way contributed to or adds to the situation to an extent that we say he helped provoke it, then you can look at that person's conduct and you decide if the defendant was unreasonable in killing him. That is hard to understand because we can't think it's reasonable to take somebody's life, but in this special issue we are not asking you to say that the defendant did not do wrong. We are asking you if you think it's proper to say that the defendant should get death or life in the penitentiary instead of death. So that is why this special issue is presented to you. Let me give you a different situation to show how you might answer it yes one way and no the other way. Let's go back to our situation where the person just goes in to rob and not kill. He goes into the store, not intending to hurt anybody, takes the money from the clerk and has walked almost all the way out of the store, and the clerk pulls a gun out from under the counter and shoots him in the back and wounds him and he falls to the floor. That clerk is coming around the counter with the gun in his hand, and he knows [p. 1140] if he doesn't shoot the clerk, he is going to be shot dead on the floor. Out of trying to do something to keep himself from dying, he shoots at the clerk. Now, our law says he is still guilty of capital murder because he walked in and robbed the store and he has killed the clerk. So he is still guilty of capital murder, but is he going to get life or going to get

death. That is an issue for you to decide and if you look at that situation, you are faced with a situation where the clerk, if he hadn't pulled that pistol from under the counter and gone after him, the defendant, he never would have been hurt. Do you see what I am talking about, Mr. Pryor?

A Yes.

Q So you might say well, the clerk, the person who was killed did help provoke the situation by pulling the gun out from under the counter and going after the defendant, so he helped to provoke the difficulty, and in looking at that, you might say well, the defendant really wasn't unreasonable in taking his life, because the clerk helped to contribute to or provoke difficulty that resulted in his death. Do you [p. 1141] see what I am driving at, Mr. Pryor?

A Yes.

Q On the other hand, you might have that cold-blooded killing we were talking about where he walks in and guns the clerk down in cold-blood and the clerk doesn't have anything in his hand and doesn't do anything to provoke the defendant. You very well might say Mr. Defendant, we find your conduct was unreasonable in taking the person's life because he didn't do anything to provoke it, and you very well might answer that yes and once again, all yes answers mean the death penalty, and one no answer on any one of those questions by ten or more of the jurors means life in the penitentiary, and not death. Do you understand, Mr. Pryor?

A Yes.

Q Any questions about what we have talked about?

A No, Sir.

Q Okay, that pretty much sums up everything I want to talk to you about. As I told you when I talked to you as a group, each of the lawyers get a chance to talk to you to see how you feel. Mr. Hobbs, the Assistant District Attorney will talk to you first, and then Mr. Mock, who [p. 1142] is seated at Counsel table will talk to you next. Mr. Hobbs, you may proceed.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good morning, Mr. Pryor. In looking at the form you filled out for us, I see that you are presently working at Continental Group as a band press operator. What do they manufacture, sir?

A Paper drums.

Q And prior to that you worked for N.L. Atlas Bradford?

A That was a machine shop.

Q Before you worked for Atlas Bradford, who did you work for?

A P.S.I.

Q How long did you work for them?

A About six years.

Q P.S.I. is plastics?

A No, it is a paper company.

Q Out off Almeda?

A This one is off of 90.

Q You understand our law in the State of Texas an individual when he reaches the age of seventeen [p. 1143] male or female, is considered an adult for all purposes of the law, and subject to the penalties as an adult. Would the age of an individual, say, someone that is young, seventeen – eighteen – nineteen years of age cause you to look at that person differently than you would someone that was older?

A No.

Q So in your mind a person that is seventeen is just – should be treated just like somebody that is thirty-five or forty or fifty years of age?

A Yes, sir.

Q Now, the Judge has talked to you about various parts, what the burden of proof is, that is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it was beyond all doubt I think that you would have to be there and actually see what happened and if you were, you would be a witness and not a juror.

A Yes, sir.

Q And what must the State prove beyond a reasonable doubt? That is the elements of the offense. Do you remember what the Judge read through the indictment, that it was the defendant, [p. 1144] Gary Graham; that it

occurred in Harris County, Texas; that it was on or about May 13, 1981; and that while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. That is what the State must prove to you beyond a reasonable doubt. That and only that. Do you have any problems with that, sir?

A No, sir.

Q Now, looking at – I can go – in a capital murder we are also – always looking at murder plus some other crime, here, aggravated robbery, or robbery. And robbery is defined in our code under the law as a person commits the offense of robbery if, in the course of committing theft and with intent to obtain and maintain control of the property, he intentionally, knowingly or recklessly causes bodily injury to another or places another in fear of imminent bodily injury or death, and if that person causes serious bodily injury, or uses a deadly weapon, uses or exhibits a deadly weapon, it becomes aggravated robbery. Now, in the course [p. 1145] of committing theft, that means conduct that occurs in an attempt to commit, during the commission of or in the immediate flight thereafter of the attempt or commission of the theft. So, in a robbery, we are also having theft, plus some actions on the part of the defendant. Say, you had this pen and I want it. You have it and I came up to you and stuck a gun and say I want that pen. A police officer comes up behind me and sticks a gun behind my head. I have already committed the offense of aggravated robbery, and I haven't got anything. Any problems with that?

A No, sir.

Q Further, you could have the pen and I could take it away from you and you could come up and touch me on the shoulder and I turn around and pull a gun, and I have committed theft, but it was after I committed it and started away that I committed the robbery, when I used the force or threatened you. Do you have any problems with that?

A No.

Q In your mind, sir, is the offense of murder in conjunction with robbery the proper kind of [p. 1146] offense that you, as a potential juror, not knowing what the facts are, that you could consider the death penalty being a proper case.

MR. MOCK: We are going to object at this time to that, as being an improper question. It calls for a conclusion on the part of the potential juror prior to hearing any evidence, and it is based on speculation and conjecture.

THE COURT: Sustained.

Q I'm going to give you a hypothetical question to use in discussing the next issue that we have, and we are still in the first part of the trial, out of the two parts, guilt or innocence phase. Needless to say, if the defendant is found not guilty, we don't even get into the punishment phase. Now let us presume that this room is the Seven-Eleven Store, and that you are present in about the position that you are now. You have a little bit of trouble seeing Mr. Pollinger, the Bailiff over here, don't you?

A Yes.

Q You have got an obstruction. You can see a little bit of him, but not fully what he is doing over there. Further, let us presume there [p. 1147] is an individual, Mr. Orte, is present here about where he is a with an obstruction such as this, this rail. Furthermore, let us presume that Mr. Thornton is where he is at. Okay?

A Okay.

Q I am going to be the person that is committing the offense. And I come in, and let us further presume that the Bailiff, Mr. Pollinger, is just about at the end of his shift. He has taken money out of the register after he has checked his receipts, and placed his money for the drop in a drop bag, one of these bank drop bags, and he has got a coat on where part of it is sticking up, where you can see it is a money bag, and it's got something in it, and further, he is in the process of stocking the shelves and holding a box and putting things in behind the register in the shelf there. Okay?

A Okay.

Q I walk in. I see what he is doing, and I see the money bag. I approach him, and I reach for the money bag, and when he sees me come, he turns. He moves away from me. I grab him and [p. 1148] at that time I pull a pistol. Mr. Orte is watching me, and as soon as he sees the pistol, he is watching that pistol. He hits the floor. He sees the pistol and he hits the floor. Mr. Thornton sees me and he sees I am moving the gun up toward Mr. Pollinger's head, and he hollers at me, and I turn and when I see him, Mr. Pollinger backs away from me, gets away from me. I turn and I shoot and kill him. I run out of the store. You haven't got a good look at me because of

where you are at. This man has hit the floor and can't see. Mr. Pollinger is dead, so Mr. Thornton – I'm caught later on. Let's further presume that they didn't get the gun I used. They didn't get anything that I might have taken from the store, and I didn't leave any fingerprints. Okay?

A Okay.

Q Now Mr. Thornton takes the stand and testifies during my trial for capital murder, because I have committed a murder during the course of committing robbery, and he said Carl Hobbs is the person that shot and killed Mr. Pollinger on the day in question. And furthermore, let's [p. 1149] presume that you have found the State has proved to you beyond a reasonable doubt each and every other element. Okay?

A Okay.

Q Now, the question here with Mr. Thornton on the stand is he is a single eyewitness. He is the only person that can say that I did the offense. You didn't see me. Mr. Orte didn't see me. You saw parts of me, but he is watching the gun, and he is the only one that looked at me. Could you, if you believed beyond a reasonable doubt that the State had proved each one of those elements to you base a conviction for capital murder on the testimony of a single eyewitness, in that case in the example of Mr. Thornton?

A Yes.

Q If you believed it beyond a reasonable doubt, sir?

A Yes.

Q Irregardless of what the age of the person was, my age and when I committed the offense?

A Yes.

Q Now, going into the second part of the trial, now, I have been found guilty of capital murder. [p. 1150] So we are going into the punishment phase. And we are going to be looking at the special issues. Now, besides the evidence that you have from the first part of the trial, which you can consider in the second part of the trial, and have to in order to answer the questions, the Judge can, at his discretion, allow the jury to hear testimony that he deems relevant under the law for the jury to hear in answering the questions that they have to answer in the second part of the trial. Okay?

A Okay.

Q That is reputation witnesses that the Judge told you, if any, either good or bad; other acts of criminal violence, if any, and any prior record, if any, that I might have had in the example that I gave. Now, special issue number one, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result. The Judge told you it would not be defined, deliberately. Deliberately, in my mind, doesn't mean premeditation. Does it in yours?

[p. 1151] A No.

Q Webster's Dictionary defines it as being a voluntary or willful act, not an accident. He intended to do what he wanted to do. If I go back and cash a deliberate act in my mind can be something that is done quick,

without much thought. If I go out and pick this pen up, I have deliberately done an act. Now, the second phase of that question is whether or not there was a reasonable expectation that the death of the deceased would occur. Let us presume that in the example that after Mr. Thornton hollered at me, and Mr. Pollinger got away from me, you stepped back a few feet. I turned and shot him in the chest. Okay?

A Okay.

Q Now, you have to look, based upon the evidence that you heard there, to see whether or not the action was done deliberately. Secondly, whether or not there was a reasonable expectation that the death of Mr. Pollinger would result from my actions. This is an example. We can't go into the real facts of the case. I think that you can see if I would have shot him in the foot deliberately, I could deliberately shoot [p. 1152] him in the foot and not expect that he would die, but if I turn and delibe ·tely shoot him in the chest or head, that puts a different answer to that. Would you agree, sir?

A Yes, sir.

Q Now, this one you have to look at the evidence, at the Case in Chief. Now, we are going down to the second one. Once again, whether or not there is a probability that the defendant – whether the defendant would commit criminal – whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society. Would you agree with me that people that are confined in prison or in jail are also part of our society?

A Yes.

Q Say a police officer or a guard there or even the prisoners, as part of our society. Now, probability doesn't mean absolutely. One hundred percent. Likely. Possible. Some of the things that come to my mind. Do you have a definition for probability, sir?

A No.

Q Okay, now, as to this special issue, now, [p. 1153] criminal acts of violence, from anything from minor assault, scratching your car, breaking out your window, to robbery, murder, rape, what have you. Do you have any problem with that, sir?

A No.

Q Now, as to these other things, reputation, prior criminal record, any criminal acts of violence, if any, would go along with the facts of the case to help you answer this. You can see that. Would you have any problem with that, sir?

A No, sir.

Q Okay, or the concept of probability, it's not something that is definitely going to happen, but it is probable, likely that this person is going to do it. Now, as the Judge told you, the State has the burden here to prove these beyond a reasonable doubt. If you believe beyond a reasonable doubt that the evidence said that your answer should be yes as to special issue number one and yes as to special issue number two, knowing that the death penalty would result if you answered that yes, would you, if you believed beyond a reasonable doubt [p. 1154]

answer them yes, knowing that the death penalty would be assessed by the Court

A Yes.

Q Okay. Now, special issue number three comes up only if it is raised by the evidence, and here, we are going to be looking at what in the example that I used, what I did and what Mr. Pollinger did. Okay?

A Okay.

Q Now, we are going to look at whether or not there was any provocation. Now, you have to decide that as a juror, based upon the evidence that you heard there. One situation is in the example that I gave you. In your mind, if it was presented to you, you would have to consider whether or not just turning away from me when I was grabbing for the thing was provocation, if it was, and that when I shot him, was I reasonable, just because he pulled away from me. That is one example. Now, let's go to another extreme. Say, the example that the Judge gave you, say that I pulled the money out of his pocket or tried to, and headed for the door, and I got to the door and he shot me in the back. I got up and I was almost out the door, he shot [p. 1155] and hit me in the leg again, and I saw him coming around the counter with the pistol, moving toward me, starting to cock the pistol, and I shoot and kill him. Now, his actions might say that that is provocation. It might or might not. You have to decide. And then, were my actions reasonable in that instance, as an example. But could you, and do you see how you would go about answering that question as a juror?

A Yes.

Q Do you have any problems with that?

A No, sir.

Q You have to decide was there any provocation, and was my action reasonable in killing whoever I killed, if it's even raised by the evidence. First of all, you have to decide was it provocation. You might not say it was from the evidence. If it was not provocation, then the action is unreasonable, and if you say it was provocation, then you have to ask was my reaction in reference to that provocation reasonable or unreasonable. Any problem with that?

A No, sir.

[p. 1156] Q If a yes answer here on all three of them it's automatic death penalty imposed by the Court. It is according to the jury answers. Now, is there any reason, sir, that you feel that in this type of a case that you couldn't be a fair juror?

A No.

Q How long have you believed, sir, that the death penalty in a proper case was a proper punishment?

A Well, ever since, you know, they brought it back. I don't know the exact time. If a person, in my mind, if a person took something and it's proven to me that he did it in the way, he already did something wrong, and if he done it in a way that it seemed he did it on purpose, I mean, a reasonable doubt that he done it, I don't have no opposition of the death penalty, so if he done it, I just say he is guilty.

Q Okay, now, that person, you would look at these special issues, and you wouldn't automatically vote yes, you would look at the evidence that was there, sir?

A Yes, I look at the evidence.

Q All right, and in your mind, as to special issue [p. 1157] number two, could the facts of the case, itself, be bad enough for you to make a judgment on an individual's probability of doing something and by the way he committed the acts he did, and you found him guilty of it?

A Well, I would have to look at all the evidence, you know, in my mind, before I could answer the number two yes.

THE COURT: Anything further, Mr. Hobbs?

MR. HOBBS: The State will pass the prospective juror.

MR. MOCK: Thank you very much, Your Honor.

[p. 1158] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q Mr. Pryor, you are not related to Richard Pryor, are you?

A No, sir.

Q Are you a native Houstonian, sir?

A No, sir.

Q What part of town did you grow up in, Mr. Pryor, Sedagest?

A Yes, sir.

Q You have three children, sir?

A Yes.

Q Let me ask you this: what does a band press operator do, just for my own edification.

A We make paper drums. It's a round tube and the machine I run that puts the seal on each end.

Q Those big barrels of paper?

A I put the seal on each end of them.

Q And how long have you worked there, sir?

A Almost a year, be a year next month.

Q Okay, you indicated you are a Baptist. What church do you attend?

A Bethany Baptist Church.

Q Do you attend regularly?

[p. 1159] A Abou three weeks out of the month.

Q Do you have any problems in your religious beliefs with your beliefs with regard to the death penalty?

A No sir, no problem.

Q You indicated that nobody in your immediate family or close associations have been victims of crimes, sir, is that a fact, nobody has?

A No, sir.

Q What part of town do you live in now, sir?

A I stay in the same area I stay on 10 off Maxie.

Q You live in the same part of the city that you grew up in?

A Yes, sir.

Q I would like to talk with you, sir, briefly about the charge here and several other things. It's no doubt we are talking about a capital murder. The end result if the defendant is found guilty of the offense as charged, and we go into the punishment phase, we are talking about a capital offense where the only two punishments is – can be life or death. Do you, sir, knowing that, have anything that would be so repugnant about the capital offense as to the [p. 1160] way they are committed, that you could not listen as a fair and impartial juror on a case of this type?

A No, sir.

Q Now, you understand that Gary Graham, as he sits here, is presumed to be innocent until proven guilty beyond a reasonable doubt?

A Yes, sir.

Q Could you, sir, give him that presumption of innocence?

A Yes sir, if proven.

Q Sir?

A If proven.

Q Would you be fair and impartial and give him that presumption of innocence until all the evidence is in, you have heard all of the facts and then you make up your mind as to whether he was guilty or not?

A Yes, sir.

Q You give him that presumption?

A Yes, sir.

Q Also, sir, this is the kind of case that is the only type of case where a defendant cannot waive or give up his right to a jury trial and have his case heard before a Judge. This also [p. 1161] means he doesn't have a right at the punishment phase, as in most cases, to have a Judge or the Court assess punishment. The Code of Criminal Procedure states that it must be done by a jury. Toward that end, we are discussing with you your views on capital punishment, and feelings of this assessment in a proper case, since you have said you could do it. However, we are also mandated by the Code of Criminal Appeals to discuss these issues prior to a finding of guilt. I would ask you, sir, would you think that because we are going ahead to discuss the issue of punishment, as mandated by the Code of Criminal Procedure, that you might think that the defendant must already be guilty or we wouldn't be placing such an emphasis on the punishment phase of the trial, if we get there?

A No.

Q So, you wouldn't hold it against him that we are talking punishment before we even get there?

A No, sir.

Q Okay, now, you indicated, sir, that you have had your feelings about the assessment of the death penalty as a punishment to be proper since [p. 1162] it came back. Have you kept up with the issue of the death penalty or death as punishment in a proper case?

A Well, I haven't really kept up, the only thing I know when I watch t.v., I watch the news a lot, and I see things that happen as far as just generally, knowing everything about it, I don't.

Q But you are aware that the death penalty at one time was abolished or stayed and now it has been reinstated as a form of punishment in a proper case?

A Yes, sir.

Q And you had no problem with the assessment of that punishment in a proper case?

A No, sir.

Q Now, you said you have had that feeling since it came out, not trying to pin you down as to exactly any time or date that you might have come to feel that way, can you, sir, tell me if you have discussed the assessment of the death penalty with others?

A No sir, not really.

Q So this is purely a feeling that has developed within your own growing and living on earth and [p. 1163] seeing circumstances around you change to feel that it would be a proper case, the proper punishment, if warranted by the facts of the case?

A Yes.

Q Okay, as relates to issue number one on the board, do you understand, sir, that it's connected by the conjunction and and [sic] it's whether the conduct of the defendant that caused the death was committed deliberately and along with that, it was done with a reasonable expectation that some death of the deceased or somebody else would occur?

A Yes sir, I understand that.

Q Would you be able to, sir, separate and, and separate those issues and answer both of those questions prior to answering the answers to special issue number one?

A Yes, sir.

Q And you wouldn't think that just because someone was killed, excuse me, someone was shot or stabbed deliberately that the person who did that act automatically had a reasonable expectation that death would occur?

A I understand. I mean, you may have to explain [p. 1164] it, but in that I wouldn't, because of the first half of it, I wouldn't just consider him guilty for the second half.

Q You would analyze and determine them in your mind?

A Yes, sir.

Q Number two goes to probability, as you have been told by two others, and briefly, sir, what kind of information would you like to have brought to you, if possible, to assist you in making the determination as to

whether one would continue to commit criminal acts of violence and be a continuing threat to society?

A Mostly, I would like to know some of his background, prior to this case, what kind of person he was, in general.

Q Would you like to have, sir, all the data that would be available to you from the neighborhood, the upbringing and any other things that might be pertinent or relevant to this individual before you would make that type of decision?

A Yes sir, I would like to know that before I make that decision.

Q So you wouldn't automatically think that because you answered yes to issue number one, that [p. 1165] you would automatically answer yes to issue number two?

A No, sir.

Q You keep them separate and apart?

A Yes, sir.

Q And you would look at this individual?

A Individually.

Q Okay, when answering those questions, sir, could you divorce your emotions from the end result, knowing what the end result would be, and vote on those issues, based on the evidence presented to you and that evidence alone?

A Yes, sir.

Q And not become emotionally involved, if it is a person and you don't want to kill somebody?

A Yes sir, I can answer that. I can, you know, I wouldn't just say the person was guilty in any case. I would like to see all of the facts before I decide anything.

Q And if you saw the facts, you could vote for death if it were the proper punishment.

A If it was the proper punishment.

Q Okay, number three issue that is on the board there. That goes to provocation. Do you understand, sir, what the Judge has explained [p. 1166] to you about the fact that there is no self-defense that can be claimed during the commission of any offense that would lead to capital murder?

A Yes, sir.

Q But there may be something that the deceased person did, which in the end causes – caused his death or advanced the situation to such a degree that he was killed or she was killed.

A I understand that.

Q Can you, sir, envision in your mind a set of circumstances where the actions of a defendant might be reasonable in light of any provocation that was done by someone?

A Explain that last part, again, the way you said it.

Q Can you envision in your mind, conceive of a set of circumstances where somebody got killed if they are in their own place of business, protecting their own property, as they have a right to do, and they were killed as a result of something they did that ended up provoking the

situation or making the situation worse where the defendant or the person charged with the offense killed him?

[p. 1167] A Yes sir, I understand that. Okay. I'm getting it the way you are saying, but –

Q If I am confusing you –

A You are confusing that.

Q I'm not trying to confuse you. Let me try again. Maybe if I give you an example?

A Okay.

Q I am in my place of business that I have worked hard for, and I have a right to be there. I have property there. Someone comes in to rob me. In an effort to protect my property, I say I am not going to take this. It may be dumb. It may be stupid. We won't be able to determine that. That is not the reason for it. Okay?

A Okay.

Q But I am not going to allow this to happen for me – for this property that I worked for so I make a reach for something under the counter. We don't know what it was. We have not seen anything. There is no evidence that anything is ever picked up, but when I make that sudden reach under the counter, the person over there robbing me shoots me. As a result, I die. It could be if I had not reached under the counter [p. 1168] or made that sudden reach for whatever I reached for, that I would still be alive. But I did something in making that lunge, which was provocation. Provocation does not have to be touching or hitting or fighting, necessarily, but I did something that provoked the incident further, which resulted in my

death. Can you, sir, in your mind, visualize a set of circumstances where that killing might be a reasonable action or reaction of the defendant to my provocation by reaching?

A Yes, sir. I understand. I'm still getting it wrong. I don't know why I'm getting it wrong, but – you are telling me the answer, but telling me – asking me the question, but I'm still not getting it.

THE COURT: Let me take a run at it, Mr. Mock. That is what I was telling you. This is the hardest one that I find to understand. What Mr. Mock is trying to get across, everyone agrees that if you have something, it is yours, you think about how the store owner reacts with the robber coming in and he takes the money and he does something to keep the robber from taking the money. The example that Mr. Hobbs gave you, [p. 1169] shooting the robber on the way out the door or the one Mr. Mock gave you where he just lunges under the counter with the pistol. You could say well, in some way, he has added to the problem that resulted in his death, be it in either example, whatever you want to use, but what Mr. Mock is then saying, you can think in your situation, be it the one I gave or Mr. Hobbs gave, where the robber is on the way out the door, and he hasn't hurt anybody, and the clerk shoots him in the back. Can you think of a situation where you would say that the defendant was not unreasonable in taking his life? In other words, that the person who is killed really, more of [sic] less, brought on the fact that he is killed. It was his conduct that caused the death and not the defendant, was unreasonable in killing him. Let me go a little further. We are not saying, once again, we are not saying the defendant is justified in killing

anybody. We are not saying that. What we are saying is can you consider this and if the answer should be no, answer it no because you are dealing with taking a person's life in capital punishment. No one is excusing what [p. 1170] the defendant did. We are saying did the person who was killed contribute to the fact he died and was the defendant unreasonable in killing him because the clerk did what he did. Is it any clearer to you now?

A No. I understand, and it is still hard and I understand what you are trying to ask me.

THE COURT: Nobody is asking you to make up a set of facts, but can you have an open mind on that set of issues, can you?

A Yes in some and no in others.

EXAMINATION CONTINUING BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q That is basically what we want. Can you have an open mind on all the issues separately and individually and answer each issue as it is raised and presented separately?

A Yes, sir. I understand.

Q Is there any reason, sir, that you could not be a fair and impartial juror in the trial of this case?

A No, sir.

MR. MOCK: That is all we have.

[p. 1171] THE COURT: All right, what says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the Defense?

MR. MOCK: We will accept, Judge.

THE COURT: Mr. Pryor, you are going to be a juror in this case. Will you stand and raise you [sic] right hand?

(At this time juror sworn)

THE COURT: Mr. Pryor, now this is going to conclude your having to be here today. We anticipate that we are going to finish picking the jury this week. You are juror number eight, and we have four more to go. We have gone through twenty-six people before we got to you, so you are free to go on back to your job out there at Continental Group, Inc. and we have got your phone numbers. You have a business phone number at that company you work at?

A Yes, 675-8241.

THE COURT: Now, we anticipate that we are going to start testimony a week from today. We think it will be next Monday when we get started. We anticipate the trial is [p. 1172] going to take a week to try. So, you will have to be here for all of next week, if we start next Monday. We will certainly, when you leave, we will give you written verification to give to your people out there to show you have been here on jury duty, and you can tell them we will be going to trial on Monday the 26th, a week from today, and we think it is going to take a week, but you have been chosen as a juror in this case. Ms. Hamilton will provide that verification for you. If

anything comes up where you need to get in contact with us, Mr. Pollinger will give you a name and phone number to call up. Thank you.

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[p. 1266] MR. BEN DENT BRADLEY, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY COURT

Q Good afternoon Mr. Bradley. Sir, in looking at your juror information form, it reflects that you have not had any prior civil or criminal jury service, is that correct, sir?

A That is correct.

Q I know that, and I noticed in looking at your juror information form that you work for Cy Fairbanks Independent School District as their Director of Security. Let me ask you this. We anticipate, Mr. Bradley, that we will be in testimony on this case next Monday, and we think that it will take a week for the evidence to be completed, so it will probably be approximately one week away from your job. Do you have an assistant out of the school district that could carry on in your absence while you were in trial?

A I'm sure they could.

Q All right, sir, so we will not create an insurmountable hardship for you?

[p. 1267] A No.

Q Was there anything about what I talked about before lunch with regard to principles that govern the trial of a criminal case that were unclear to you or I need to speak about further?

A No.

Q As I told you before lunch, this is a capital murder trial. If you serve as a juror in this case, there is a possibility that you would be placed in a situation where you would have to vote your conscience based on the evidence that was presented on the punishment phase of the trial, and that would present only two alternatives on the punishment phase. Once again, as I told you earlier, the only alternatives for punishment in a capital murder case are death by lethal injection or life in the Texas Department of Corrections. Do you feel, sir, that you could participate in that verdict if you felt it was a proper case where the death penalty was assessed as punishment?

A Yes, I feel that I could.

Q It is obviously not something that anybody [p. 1268] wants to do. The question is could you serve on a jury in that case. I take it, then, by your answer, Mr. Bradley, that you do not have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment in a case that you thought would be a proper case for capital punishment, is that right, sir?

A That is right.

Q Let me give you a little general discussion about the punishment phase in a capital murder case, and then we will speak specifically. The State of Texas has the burden of proof in the punishment phase of the trial, just as it does in the guilt or innocence phase. The State, in seeking the death penalty, must prove to you beyond a reasonable doubt that the death penalty is the proper

punishment. The defense has no burden to present any testimony. They have no burden to convince you, other than the death penalty is not proper punishment. All the burden is on the State. There is no shroud of secrecy surrounding the jury's verdict. The jury does not go back in the [p. 1269] jury room and roll dice and that determines what the verdict is. There are two special issues that are presented to the jury, and it is the manner in which they are answered that dictate to the Judge what the punishment is going to be. The Judge does not have any discretion to change the verdict one way or the other. And it is the way in which these special issues are answered by the jury that determine what the defendant is going to receive as punishment, be it life in the penitentiary or death. Assume that you have found the defendant guilty of capital murder. You have found that while in the course of committing a felony offense he took the life of another human being. You are convinced beyond a reasonable doubt. You now are in the punishment phase of the case. It then becomes your decision after the testimony is presented upon the punishment phase of the trial to decide what the punishment should be. The first special issue that you will have to consider will probably cause you to think back upon the testimony that you heard in the guilt phase of the trial, and for you to deliberate [p. 1270] once again upon the conduct of the defendant that resulted in the taking of the life of another human being. That is the first special issue that is placed on the bulletin board behind you. Will you take a moment to read that, Mr. Bradley, and then we will speak about it. In looking at the first special issue we are asking you if the conduct of the defendant that caused the death of the

deceased was, number one, done deliberately, and number two, did the deceased or did the defendant reasonably expect that the conduct would result in the death of the deceased or another person. There will be no definitions that I will give you to assist you in your deliberations on any of these special issues. They will all require that you use your common definitions and common sense in answering these issues. But I think they are fairly uniform definitions as to what these words mean. Deliberately, in my mind, means that it is a person's conscious objective to do something. He intended to do something. He voluntarily goes forth in committing that act. It is not an accidental [p. 1271] act. It is not necessarily a premeditated act. It is something that he intended to do and does, and secondly, did he reasonably expect that the death of the deceased or another person would occur. There are many examples that we can give to you to show you ways that you might answer yes sometimes and ways you might answer no in other times. I can think of at least three situations that may require different answers. Assume that someone goes into a U-Totem Store out in Cypress Fairbanks to take money because he has a sick family and can't get money any other way, doesn't intend to hurt anybody, never intended to, doesn't intend to start now. That is the only way to get money. He goes into the store and trips on a banana peel that someone left lying on the floor, slips on it and looses [sic] his balance and the gun flies out of his hand, hits the floor and accidentally discharges and the clerk behind the counter is struck and is killed. He is guilty of capital murder. When it comes time for you to review that person's reasonablness [sic] that another person might do, you

might answer that [p. 1272] no that he didn't reasonably expect to kill someone. On the contrary, you may have a cold blooded killing where a clerk is gunned down at gunpoint in cold blood. You might answer that yes, that the defendant did intend to commit a deliberate act and he reasonably expected the death would occur. Third possibility might be where a person robs the store and the clerk starts out at him and he shoots the clerk in the foot to keep him from following him. The clerk falls out after having been shot in the foot and hits his head on the counter and dies. You might possibly say well, he didn't expect that the clerk would die because he shot him in the foot. It is just some freak thing that happened. There are many situations that dictate different answers?

A Yes.

Q The second special issue deals with you being called upon to predict the future to the degree of probability. If you would take a moment to look at the third special issue. We are asking you – once again, there will be no definition of terms – we are asking you [p. 1273] the probability. The degree of probability, is it more likely than not, possible 51%. Is it probable that the defendant will commit criminal acts of violence that constitute a continuing threat to society. Acts of violence mean many different things, from someone pushing one of your students, possibly from the back and if that student finds it offensive, the person who does the pushing is guilty of a Class C misdemeanor offense of assault, to the opposite end of the spectrum of capital murder, and many things in between. Offenses against persons, rape, kidnapping, robbery, crimes against property. Slashing of tires. The throwing of paint on paint jobs. These are criminal acts of

violence that involve property, but nonetheless are still acts of violence, and possibly might fall within this group. And is the defendant probably going to commit these acts that he commits that will constitute a continuing threat or ongoing threat to society. Once again, we are seeking to find 12 people who will have an open mind on all of these issues until the evidence is complete. We do not [p. 1274] want 12 people who are going to, as a knee jerk response, vote for the death penalty, merely because they found someone guilty of capital murder. By the same token, we do not want 12 people who are automatically going to vote for life in prison, no matter what the State presents. We need to find 12 people who say they can consider the imposition of the death penalty in a proper case, and if the State proves to them beyond a reasonable doubt that these issues should be answered yes, then answer those issues yes. Do you feel you are within that group, sir?

A Yes, I feel that way.

Q I don't know if I told you or not, Mr. Bradley, a yes answer by the verdict requires a unanimous answer. All 12 must agree the answer should be yes. A no answer requires a vote of 10 or more. If 11 people say the answer should be no or 10 people say the answer should be no, then the answer is no. A no answer on any one of these special issues dictates to the Court that life in the penitentiary is the jury's recommendation. [p. 1275] All yes answers mean the death penalty. There is – strike that – there are types of evidence that may be presented to a jury on the punishment phase of the trial relative to the second issue that will assist the jury in its deliberations as to whether or not the defendant probably will commit

these acts of violence in the future. You are entitled to hear other testimony relative to past criminal record, relative to other criminal offenses that the defendant may have committed, and relative to the opinion concerning the defendant as expressed by other people from the community. On the contrary, it may be all things good. No criminal record and people have nothing but good things to say about him. So once again, there are many situations that dictate different answers because of the conduct or lack of conduct in the testimony that is presented to you as jurors. Those two issues are presented in the punishment phase of every capital murder trial. There is possibly a third special issue that will be presented to the jury in this case. We do not know if it will or not [p. 1276] because the evidence is not going to present it. If you would take a moment and read the third special issue, Mr. Bradley, and then we will speak about it?

A All right.

Q The first thing I want to point out about this special issue is the fact that it is only presented if it is raised by the evidence. If it is not raised by the evidence, it is not presented. Unlike the first two, they are presented one way or the other every time. Special issue number three calls upon you, if it is raised by the evidence, to compare the actions of the defendant and the deceased prior to the deceased's death. We are asking you if the defendant, in taking the life of the deceased, acted unreasonably in light of provocation, if any, that the deceased committed prior to his death. We are not saying that the defendant is entitled to a self defense charge. He is not entitled to sympathy for defending himself when

he had provoked the difficulty in the first place by walking in the store with the loaded pistol. He has provoked the difficulty. He can't claim [p. 1277] self defense. Where our law deems it proper for a jury to consider testimony about the deceased provocation in a situation is when you are faced with the dilemma of life or death. Our Legislature has deemed this to be something that a jury might consider in assessing life or death. Once again, go back to our situation where the person has gone in to rob but not to kill. He has taken the money and replaces the pistol in his belt and is walking out of the store when the deceased, from under the counter, pulls a pistol and fires and hits him in the shoulder. The defendant falls to the ground and the deceased comes from behind the counter with the pistol drawn and aims to shoot again and the deceased, in self preservation, fires back and takes the life of the deceased. We are not, once again, condoning the actions of the defendant, number one, in the robbery or number two, taking the life of the deceased, but what we are saying is if the deceased had not, in essence, provoked the difficulty by coming out from under the counter with the pistol and going out after the defendant, he would not have died. [p. 1278] So was there some provocation on the deceased's behalf prior to his killing. Once again, we are not inpugning [sic] any ill will or criminal intent on behalf of the deceased. That rests with the defendant, and what we are saying is please consider whatever testimony, if it is appropriate pertaining to this and compare the two individuals' conduct in the matter in determining whether or not the defendant acted unreasonable in taking the life of the deceased. It kind of flies in the face of the right to defend your property, but once

again, the importance of the decision outweighs these past judgments that are ingrained in our consciousness, and that is the ultimate decision of whether or not the defendant lives or dies. So you see the thrust that I'm trying to make with regard to this special issue?

A Yes, I do.

Q Do you have any questions, Mr. Bradley, about anything we have talked about so far?

A No.

Q Do you feel these issues are clear to you?

A Yes.

[p. 1279] Q That concludes the comments I wish to make. Mr. Hobbs, the Assistant District Attorney and then Mr. Thornton, I believe Mr. Mock on behalf of the defense will question you. Mr. Hobbs, you may proceed.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good afternoon, Mr. Bradley. The people that are here, this is Mr. Mike Addudel and two people in the jury box are Ms. Northcutt and Mr. Orte that are legal interns, law students. Sir, as mentioned earlier and the Court hasn't instructed you, but as a potential juror, the attorneys cannot speak to you on that and we are not trying to be rude or anything of that nature, so earlier when I said I couldn't speak to you, I hope you can understand. Sir, have we met before. I seem to have remembered you from a couple of years back?

A I have been trying to think of, I recognize your face, and I think what it had to do with –

Q While you were working for the Houston [p. 1280] Teachers Credit Union Association, I think you had someone that was fraudulently using your name?

A That is what it was.

Q Would that in any way affect your decision based upon that incident and the facts of this case?

A None whatsoever.

Q Okay. Now, you had told the Judge you could in a proper case be a party as a juror in assessing the death penalty. Is there any set or type of case that would preclude you from considering it as part of a capital case? Now, you have heard the Judge read the indictment to you. Not knowing any of the facts and you won't know any of the facts in this unless you are a juror, just the offense of aggravated robbery and a death allegedly being taken during the course of that robbery, is that type of – a type of case that you would – if you believed beyond a reasonable doubt that the State had proved that to you beyond that doubt, each and every element of that offense in a proper case, the type of offense that that could be [p. 1281] considered by you for the death penalty?

MR. MOCK: Your Honor, we would raise our same objection that is an improper question, calling for a conclusion, based on conjecture or speculation.

THE COURT: Sustained.

Q Now, the State's burden is beyond a reasonable doubt, not beyond all doubt. If it was beyond all doubt, you would have to have been a witness to it, and if you were a witness, you couldn't be a juror. Now, what does the State have to prove beyond a reasonable doubt? Those elements of the offense, and the Judge has read the indictment to you, but I want to go over it because it is important. If we don't get past the guilt stage, needless to say, there is nothing to worry about in the punishment stage. And that it is the defendant in this case, Gary Graham, in Harris County, Texas, on May 13, 1981, while in the course of committing and attempting to commit or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Now, that is [p. 1282] what the State must prove beyond a reasonable doubt. That and only that. Do you have a problem with that, sir?

A No, I don't.

Q Okay, do you understand our law when an individual, which I am sure you are familiar with in your capacity now, reaches the afe [sic] of 17, that person is subject to the full extent of the law as an individual that is 35, 40 or 50 years of age. Would the mere youth of the defendant or an individual charged with a very serious crime affect you in the deliberations of the facts of the case, which that individual is alleged to have committed?

A No, I don't think it would.

Q Okay, now, you have children that are a little older than 17, some that are younger, and your children

are fairly young. That fact would not preclude you from sitting as a fair and impartial juror in a case?

A No, sir.

Q Now, I would like to give you a hypothetical situation that I will use in my next question as far as the first part of the trial. And I will also use in discussion of the special [p. 1283] issues in the second part of the trial. Now, let us presume that this room is a 7-Eleven store, and furthermore, that you are present in the store, and besides yourself, let us say there is Ms. Northcutt that is present in an area such as she is at with an obstruction, something similar to the railing here, and furthermore, Mr. Pollinger, the bailiff, is also present and behind the register, and is a cashier. Furthermore, that Mr. Thornton is also present in an area such as he is here where he can see both Ms. Northcutt and he can see you and he can see Mr. Pollinger. I think from where you are at now you have a little problem seeing Mr. Pollinger?

A Yes.

Q Let's presume there is an obstruction of some sort such as what you have right in this courtroom, and let us further presume that it is near the end of the shift, and Mr. Pollinger has closed out his shift's register, has taken the money from the register and prepared it for a drop and places it in a commercial drop bag. He is [p. 1284] wearing a coat. He slips that bag with the bills in it and places it in his coat pocket. A small portion of it is still showing, enough so that you can see it is the money bag and it has something in it. Furthermore, let us assume that he is in the process of behind the counter, behind the register, restocking the shelves for the next shift, and he

has got a box in one hand and placing items in the shelf. Let us further assume that I enter the store. I come up and I see Mr. Pollinger, and I see the money bag protruding from his coat pocket, and I know what it is. And I'm going to take it. Let us presume that I go up, I grab at the bag. Mr. Pollinger sees that I am there or senses me, turns, still holding the box and turns away from me. When he turns, I grab him with my hand, reach down and come up with a pistol. Let us presume further that Ms. Northcutt is watching. She has vaguely seen me, but when she sees the pistol, she is concentrating on the pistol, not me and not what I look like. She dives down, hits the floor. Further, you hear a commotion, maybe, might have saw me [p. 1285] just glanced and saw me come in through the door, but you don't see me, and what I look like. And then, Mr. Thornton is in a position that he is in now and that when he sees the gun, as I pull it, hollers at me, and when he hollers, I turn and look at him. Mr. Pollinger breaks from me. I turn and he gets several feet from me and I turn and shoot him and run out the door. Now, under our law, robbery can be committed without theft of any property being taken. As an example, if I walk up to you, sir, and pull a gun on you and demand your money, and a police officer came up behind me and stuck a gun in the back of my head, although I haven't got anything and I haven't done any more than what I have just explained, I have committed the offense of aggravated robbery. Do you have any problems with that?

A No.

Q Robbery is in the course of committing theft of property, which means conduct in an attempt to commit,

during the commission or in the immediate flight after. If I took something from your pocket, turned and walked away and [p. 1286] you turned around and touched me on the shoulder and I pull a gun, I have committed robbery there. Any problem there?

A No.

Q Going back to my question, let's presume further that I'm caught later on. I'm brought in and I'm being tried for the offense of capital murder because in the situation there I have taken the life of Mr. Pollinger in the course and commission and attempted commission of aggravated robbery. Do you have any problems there?

A No.

Q Now, let us further presume that the weapon that I used was not recovered, that I didn't leave any fingerprints or anything. Anything I took out of the store was not recovered. So when I am being tried, let us further presume that the State has proved beyond a reasonable doubt each and every one of the other elements of the offense, that it occurred in Harris County, that it was on or about a specific date, that it was during the course of a robbery and that the death of Mr. Pollinger resulted from an intentional [p. 1287] act upon the perpetrator's part in killing him with a gun. Okay, further that Mr. Thornton takes thestand [sic]. He takes the stand and testified under oath and points me out and says Carl Hobbs is the person that committed that robbery and shot and killed Mr. Pollinger. If you believed his testimony beyond a reasonable doubt, although there were three other people, I mean two other people besides Mr. Thornton there, Ms. Northcutt, who was down on the floor and only saw

a pistol, and you might have heard the commotion, but you didn't see anything. Now, put yourself in a position of a juror now. Based upon the testimony of a single eyewitness, if you believed that person beyond a reasonable doubt in that the State had proved the elements of the offense, the other elements of the offense beyond a reasonable doubt to you, could you base a verdict of conviction for the offense of capital murder on the testimony of a single eyewitness if you believed that person beyond a reasonable doubt?

A If I believed the person, absolutely, sure, I could.

[p. 1288] Q Now, would you require a greater burden of proof than that of beyond a reasonable doubt, as the law would require?

A No.

Q Okay, you would use your what the – the instructions that the law would give you to judge that witness as you would any other witness that was presented to you, not anything greater or anything more?

A I'm not sure I understand.

Q Okay, sir. Let us say that there was a police officer that came to the scene, and he testified as to the way he found things. you have a choice to believe part, all or none of what he testifies to. Would you place a greater burden of belief, a greater burden on the State and you, as a juror, to accept policer officer's testimony than you would Mr. Thornton's testimony, that I was the person that committed the offense?

A No.

Q Okay, and regardless of my age, if you believed that single witness, eyewitness, beyond a reasonable doubt, no matter if I was 17 or 60, would it make a difference?

[p. 1289] A No.

Q Now, going into the punishment phase of the case, sir, we are looking at special issue number one, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result. As the Judge has told you, it is a two-part question. Deliberately is not defined. It doesn't mean premeditated, as the Judge has told you. It also doesn't mean accidentally. That is a given – Webster defines it as being a willful or voluntary act. Do you agree with that or do you have some definition that comes to your mind of deliberately?

A No.

Q A second part of that is reasonable expectation that the death of the deceased would result. Needless to say, in answering special issue number one, we are considering the evidence of the fact situation which the defendant, since we are in that punishment phase, has been found guilty of, and you are having to answer that question. Now, with a deliberate act [p. 1290] can be if I walked over to this water fountain and got this cup out and filled it partially, this is a deliberate act with little or no thought involved, other than the time it took to walk up there and to take it. Now, in looking at that deliberate act that caused the death of the deceased, was there reasonable expectation that the death of the deceased

would occur. Let us take our example I have given you in a hypothetical situation and further state that as I was going out the door and I turned, as I turned and shot Mr. Pollinger, I shot him in the chest, you might answer that question whether there was a reasonable expectation that death of the deceased would result from where I hit him or if I hit him in the head. On the other hand, as an example, sir, you may look at it, if there was, I could still deliberately do an act if I came back and as he was backing away I shot him in the foot, I committed a deliberate act, but there might be some question whether or not shooting that individual in the foot and say he fell and hit his head on the edge of the counter, [p. 1291] causing his death, but I reasonably expected that he would die as a result of me shooting him in the foot. Do you have any problem with that, sir?

A No.

Q Special issue number two, we come into the aspect of probability. Once again, a word that is not defined and in this second special issue is where the Court in its discretion can admit the evidence which the Court deems proper for the jury to hear in the second phase of the trial which can aid you in answering special issue number two. Would you agree, sir, that the fact of the case that you heard during the guilt stage of the trial gives you some insight as to the conduct in a given situation of the defendant in which you can go about answering special issue number two?

A Sure.

Q Now also, during that phase, as the Judge told you, it may consist of any prior criminal record, if any,

other criminal acts of violence, if any, and the Judge has defined that for you from simple assault to criminal [p. 1292] mischief to breaking a window, all the way up to aggravated robbery and murder and whatever. Probability, it is not an absolute certainty. Possible, likely, terms that come to my mind when I think about probability. Criminal acts of violence that would constitute a continuing threat to society. Broad sense of society. Taking in not only the test of a day to day test that each of us have here and the people in their work places here, but also taking into consideration those people that are confined in penal institutions are part of our society. Would you not agree, sir?

A Yes.

Q And looking at that probability of criminal acts of violence, that could be towards either to a prison guard, jailer, or other prisoners being held. Now do you have a problem in looking at those factors in being able to answer special issue number two?

A No, I don't.

Q Would you, sir, if you believed beyond a reasonable doubt, based upon the evidence that you heard in the case after hearing that [p. 1293] evidence, and you believed that the State has proved the answer to special issue number one should be yes, and that the answer to special issue number two should be yes, and they were the only two issues submitted to you, and there was a unanimous verdict by the jury, would you and could you participate in that unanimous verdict, knowing that death would be the result of that unanimous yes verdict on each answer, special issue one and two, by the Court?

A I think I could.

Q Okay, now, when you say you think you could, would there be a circumstance when you could not?

A Well, the thing that I'm concerned about is at least based on the kind of information you give me is how sure I would have to be about it. It would have to be beyond a reasonable doubt.

Q It wouldn't have to be beyond a shadow of a doubt. You wouldn't require the State to do more than that?

A That is right.

Q Now, considering the example that I used, in [p. 1294] discussing the questions I have been asking you, we have two things we have to consider there, sir, whether or not the conduct of the defendant, in the case of the example I was giving you, my conduct in killing the deceased, Mr. Pollinger, was unreasonable in response to any action or provocation on his part, if any. If there was provocation by the deceased, Mr. Pollinger, so the question you have to look at is you have to look at the actions of my actions and what I did in response and what, if any, actions Mr. Pollinger did, what did he do. Okay, when you decide from the evidence what he has done, you have to decide whether or not that was provocation, once again, you are using your good common sense. Now, in the situation I gave you, you may or may not feel that that is provocation, and then was the actions of him pulling away provocation, in the first place, and if it was provocation, was my reaction unreasonable in shooting him and killing him. Now, let's take it to a far extreme, as

kind of a contrast to that. Say that I managed to get the money bag from his [p. 1295] pocket, that I got to the front door and just as I reached the front door Mr. Pollinger shot me in the back. I fell to the floor and I got back up to my feet and pushed the door partially open and he shot me in the leg, and I fell again. As I fell this time, I turn and I saw him coming from behind the counter, holding the gun and starting, and him in the actions of cocking it back, I pulled the gun from my waist, shot and killed him. Now, in that sense, you might very well find that there was, in fact, provocation on my part, by getting the gun and shooting him when he shot me in the back and shot me in the leg and him coming from behind the counter and my actions was not unreasonable in shooting him. I don't have a right of self defense, but it might not have been unreasonable that I would, I shot him twice. He had shot me twice before I shot and killed him. Not that I'm not guilty of the offense of capital murder. In looking at those special issues, is there something that I have not asked you that you would like to know about?

[p. 1296] A I can't think of anything.

Q As to things we have discussed is there some area that I have muddied the water, have confused you about that you would like to ask a question about, sir?

A No.

Q Is there any reason, sir, that you feel you could not be fair in this kind of a case?

A Not that I can tell.

Q And in your capacity as a special agent, were you in intelligence for that entire 20 year period?

A No, I ran criminal investigations for about probably 10 years of that, background information.

Q As an armed agent, sir?

A Occasionally, not very often.

MR. HOBBS: Thank you. Pass the witness.

THE COURT: Mr. Mock?

[p. 1297] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court, Your Honor?

THE COURT: Yes, sir.

Q Mr. Bradley, you work for HISD, and now Cy Fair ISD. Do you know Les Burton?

A I know Les, but I'm not really acquainted with him, but I have spoken to him. I know who he is.

Q Your face is awful familiar to me, sir. Did you in the past 3 or 4 years be at HISD on the weekends?

A I don't recall any specific thing. I didn't work for HISD. I worked for Houston Area Teacher's Credit Union.

Q Which was right behind them at that time?

A It used to be on Richmond.

Q Before they moved way out there. I wonder if you remember my face. I used to work in security for Mr.

Burton at the back door. I wonder if you remember my face?

A I don't believe I recall.

Q Because I was at the credit union quite a bit?

A I might have seen you there.

[p. 1298] Okay. You attended Yale University, sir?

A Yes, for one year.

Q Okay, majored in language. Any special language?

A Yes, Japanese.

Q Now, you mentioned that you were a special agent?

A It was for the Department of Air Force.

Q Okay, so you worked directly for the Air Force, United States Air Force?

A Yes, sir.

Q This was, I assume, sir, after you had been released from service in the military?

A No, I was still active duty. I was in active duty for 26 years.

Q Okay, that is what I was trying to clear up. You were active duty in the Air Force for 26 years, 20 of those as an agent with the OSI. Were you a commissioned officer at that time?

A No.

Q Would you explain what the difference is as opposed to being a commissioned officer enlisted man type person with the military as opposed to the OSI?

A Okay. Well, the OSI does all the criminal [p. 1299] and counterintelligence investigations for the Air Force. We work in civilian clothes and our range at that time when we were doing this is classified because we also have enlisted people which I was an officer personnel doing the same type of work and because of that, you work in civilian clothes, and your identity or rating structure is kept quiet.

Q You were basically in the military?

A Absolutely.

Q All right now, the fact that you were involved as a special agent for 20 years, sir, there may be police officers that will testify. Would you, sir, give more credibility to a police officer's testimony just because he is a police officer and for no other reason than you would to a lay person's testimony?

A No, I don't think so.

Q Has your affiliation with an investigative branch of the military given you some type of kindred spirit to law enforcement or the police officers?

A Probably so that, I don't know that I realize that, but I would think it probably has.

[p. 1300] Q In light of that, would you be able to be fair and impartial as it may relate to any witnesses that the defendant might have as opposed to witnesses that the prosecution might have?

A I would hope that I could.

Q I can appreciate your candidness and honesty, but hope that you could is not going to be enough. We have, because of the seriousness of the case we are involved in, we must get a little more particular and specific with you.

A Well, I feel that I can.

Q That is fine.

A I'm trying to be as honest as I can with you. If I have any kind of prejudices in that direction towards one person or another as far as their testimony is concerned, I don't know it.

Q Well, sir, let me assure you at this point we appreciate that honesty and we are not trying to ask you to do something that you can't do. Our questions are – they are not right or wrong answers. Our questions are couched to get to know you in a very limited period of time. We are not trying to confuse you or do [p. 1301] anything of that nature or imply anything, but just as best you can and if you say you feel you can, that is the best answer we can ask for. So there are no good or bad answers, and we are not trying to determine whether you are right or wrong. We are trying to determine what your stance is on certain things. Now, you indicated that you or your spouse or someone else in your family has studied law. Who would that be?

A My father was a Judge and lawyer.

Q Where was this?

A In Houston County, Crockett.

Q Crockett, Texas?

A Yes.

Q Did he handle criminal cases?

A I was pretty young when my dad died, so I don't know that much about the work he did. He was a County Judge.

Q Okay, you mentioned that you had, you indicated that you had been interested in the outcome of a criminal case. Would you share with us what that case, that was or if it was related to your job?

A They were related to my job, and no particular [p. 1302] case, but everything I was also interested in the outcome of any investigation that I did.

Q Okay, let's talk about these special issues a little bit, and in light of that, sir, you realize, do you not, that as he sits here before you now, Gary Graham, is cloaked with the presumption of innocence?

A Yes, sir.

Q Would you be able to give him that presumption of innocence until rebutted by credible evidence and all testimony is in and then you have a chance to make up your mind whether he is guilty or innocent?

A Yes, I would.

Q And we are mandated by the Code of Criminal Procedure because this is one of the only instances or the only instance where a defendant cannot give up his right to a jury assessment of punishment. In other cases he can waive or give up that right and have the Court assess his

punishment. When you are charged with capital murder, and the only two punishments that can be meted out are life or death, a defendant does not have an opportunity to waive or give up that right. [p. 1303] So we are in a position where we have to discuss punishment with you prior to getting there on the guilt or innocence phase of the trial. Hopefully, sir, you won't think that because we are discussing punishment with you that we are looking ahead to punishment and assuming or looking ahead with the fact that he is going to be found guilty?

A I understand.

Q And you would not hold that against us, that we are discussing punishment with you at this time?

A No.

Q Okay, special issue number one, if we get to that point, sir, is a two prong question. One is whether the act was deliberate or done deliberately, and the other is whether there is a reasonable expectation that a death would occur. Can you, sir, in your mind, conceive of a set of circumstances and not calling on any fact situation that you necessarily have been given here today, but the legislature, in its intent was to allow for any range of circumstances which might occur, could you, sir, foresee in your mind [p. 1304] any set of circumstances where one might commit an act deliberately and not have a reasonable expectation that a death would occur?

A I'm not sure I understand that.

Q Let me see – okay – there is the two prong nature of the question, joined by that wonderful conjunction

and. So you have got to look at it from two separate points. Can you understand that?

A Yes.

Q Would you be able to separate the two, and analyze each part separately and answer that part separately before you answered your general answer to special issue number one?

A Yes.

Q And could you have an open mind during that phase of your deliberations, where you are separating and analyzing it?

A Yes.

Q Could you, sir, in your mind, conceive of a set of circumstances or facts, and I'm not asking you to give us something that you would find to be deliberate or without a reasonable expectation, but can you, in your [p. 1305] mind, see where sometimes you might find that one acted deliberately and had an expectation that somebody would die versus where one acted deliberately and did not have a reasonable expectation that someone would die?

A Yes, I can see the difference.

Q So you wouldn't think that automatically just because someone did something like shooting somebody, that they would automatically have an expectation that that person would die?

A Well, like an example if somebody was shot in the foot or something like this, I would see that maybe they

would not expect him to die. If that answers your question?

Q Okay, well, it answers my question with respect to that example. But for foregoing that example and going into your own mind and I'm not asking you to give me any example of your own, but I am asking you can you conceive of other situations, other than that example where you might not have an expectation that somebody would die?

A Possibly.

Q Okay, concerning special issue number two, what type of information would you like to have [p. 1306] brought to you, sir, before you could make that kind of answer of yes, that a person would commit criminal acts of violence that would constitute a continuing threat to society?

A Well, I would like to know more about the personal history and what he had done previously, whether it be good or bad or what, up until the time that the particular act happened. I would need to know more about him than just this one particular act.

Q Would the fact that a person had committed a criminal act of violence make you automatically vote yes to special issue number two?

A Single act?

Q Yes?

A No.

Q Special issue number three goes to provocation, and in a proper instance, not in one of these instances,

but in an instance of just murder, a person has available to them the defense of self defense or self protection of oneself. As you have been told today, a defendant in a capital murder case does not have that defense [p. 1307] available to him. He can't say that well, I shot him because I shot him because he was going to shoot me. I shot him because he made a move and I was afraid he was going to kill me. If found guilty, he was in the course of committing an offense, himself, which means that you can't be excused for doing something because somebody else did something to you if you are already there and you provoked it, yourself. However, if it is raised by the evidence, you would have to determine whether the conduct of that defendant, in doing what he did, namely killing somebody else, was reasonable or unreasonable in light of the provocation by the deceased person. Can you, sir, in your mind, conceive of facts or circumstances which caused the death of the deceased person based on his provocation and where the acts of the defendant would not be unreasonable? If I confuse you, tell me. I might have confused me. I was trying to follow a train of thought?

A Would you, if I understand it right, this doesn't have anything to do with whether the [p. 1308] person is guilty of the capital murder charge?

Q Nothing at all, sir. If we get to this phase, we are at the second stage of the trial, the punishment phase, and he has been found guilty.

A All right, then yes, I can understand how it could be.

Q Let me give you an example that might not necessarily go to an extreme. I'm in a store, my own store with my property, earning a living, like everybody who is a citizen of Harris County is asked to do, just work and maintain my business. Someone comes in to rob me. I make a judgment that I'm not going to give up the property I have worked hard for to this person. They don't have a right to it. Now, it is not for us to determine whether that judgment call I make is a dumb or stupid judgment call, but the fact that it is made, well, in attempting to protect my property, what is my own, I reach – now there is no showing that I got anything, that I got a gun under the counter or I got anything, but I reached, when I reached, the person who is standing there with a gun in [p. 1309] reaction to my reaching shoots. Now, we don't know where he hit, but we know as a result of my being shot I'm dead. That in no way lessens the fact that the person is guilty of capital murder, but can you, sir, in light of those circumstances, see what I did, and I am not asking you to determine whether it is reasonable or not at this point, but can you, by the facts that I have given you see what I might have done in making the reach, might have provoked the person into shooting?

MR. HOBBS: Your Honor, I would object as being improper question, calling for the witness to be bound by an answer or to answer to a specific given set of facts.

THE COURT: That is sustained. I think the witness has already answered the question prior to that, Mr. Mock, that he could keep an open mind on that issue.

Q (By Mr. Mock) You could keep an open mind on that issue?

A Yes.

Q And you wouldn't automatically vote yes just because I'm protecting my property and someone comes in with a gun and robs me and ends up [p. 1310] killing me?

A I don't now how to answer your question. Would you repeat it for me, please. Let me see if I can get it straight.

Q That you could keep an open mind, which you said you could do and that you would not –

THE COURT: Let me try, Mr. Mock. Remember the example I gave you, Mr. Bradley, about the store clerk shooting the defendant after he had been wounded and was on the floor, in light of that situation or any other situation we have given you, could you keep an open mind and only answer that special issue after all the evidence was completed?

A Yes.

THE COURT: That is sufficient.

[p. 1311] EXAMINATION BY DEFENSE CONTINUES

QUESTIONS BY MR. MOCK:

Q I would like to just ask you, sir, about your views on the death penalty. You indicated to the Court that you were not against the death penalty as assessment of punishment in a proper case?

A That is true.

Q When, sir, did you develop your views on the death penalty?

A Well, I – let me tell you I have had a hard time with that problem because it has come up, you know, over the years, and because of some of my religious beliefs I used to have a terrible problem with the death penalty, but I guess because of the close association with a pastor of mine about three or four years ago I realized that yes, under some circumstances a person does forfeit the right to live. That is when it happened.

Q You say that was as a result of a conversation with some minister you had, pastor you had, sir?

A Well, not just a conversation with him, but I [p. 1312] think he was part of the cause for me feeling like I do today, that yes it is possible under certain circumstances that a person should be given the death penalty.

Q You indicated that you have strong religious beliefs. Are you very active in your church?

A Well, fairly much.

Q Okay, but although you have those religious beliefs and it may be hard for you to do, could you, sir, if you found beyond a reasonable doubt that the answers to all these issues should be yes, could you vote yes?

A Yes.

Q But you would be fair and impartial, look up all of the facts, all of the circumstances presented before making that decision?

A Yes.

Q Is there anything that you can think of, any reason you can think of that you could not be a fair and impartial juror as relates to this case?

A Not that I know of.

MR. MOCK: Your Honor, we pass the witness.

[p. 1313] THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State accepts.

MR. MOCK: May we have a moment, Your Honor, to converse?

Your Honor, if it pleases the State, we will accept. If it pleases the Court, we will accept.

THE COURT: Both sides accept Mr. Bradley as a juror. Will you stand and raise your right hand and be sworn.

(At this time juror sworn.)

THE COURT: Mr. Bradley, this will conclude your jury service as far as today. As I told you, we anticipate that the evidence will begin to be presented on the 26th, which is a week from today. We anticipate that it will take approximately a week. We have phone numbers, both home and business for you. We will contact you at some point later this week to assure you that we will be starting on Monday. My courtroom is on the 4th floor in this building, and the case will be heard in my courtroom on the 4th floor of this courthouse. If there is any need for you [p. 1314] to contact us, Mr. Pollinger will give you

our phone number. With that, you are excused. If necessary, Ms. Hamilton will give you something to show you have been on jury service.

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[p. 1402] MS. BILLIE DIANE GASKILL, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q. Good morning, Ms. Gaskill. It has been about one day, I guess, since I made my remarks to you as a panel as a whole, and I noticed in looking at your juror information form that you have had prior civil jury service but not prior criminal jury service. There were many principles that I discussed with the jury panel yesterday with regard to the trial of a criminal case. Did you have any trouble understanding this?

A. No.

Q. Do you feel you can apply those principles?

A. Yes.

Q. As I told you yesterday, Ms. Gaskill, the offense with which we are working at this time is the offense of capital murder and that the defendant, Gary Graham, is accused of committing the offense of capital murder, and in being accused of that offense, there is a possibility that [p. 1408] [sic] Mr. Graham, should he be convicted of the offense of capital murder, will receive the death penalty as punishment. It is not a certainty. It is a possibility, and we have to plan for all contingencies. Obviously, there are many things that will come into play before that stage is reached. As you recall yesterday, I told you that the trial of a criminal case takes place in two phases. The first phase is the guilt-or-innocence phase, and the State must

prove to the twelve members of the jury beyond a reasonable doubt that he is guilty of a crime that he has committed before the punishment phase is reached. Do you understand that?

A. Yes.

Q. So at the punishment phase of a capital murder trial, the jury is faced with two possible punishment alternatives. Those alternatives are life in the penitentiary or death by lethal injection. So, obviously, it is a very serious situation. All right. My question deals with your feelings about the punishment alternatives in a capital murder case. As I told you yesterday, I asked each of you to spend some time on individual reflections with regard to [p. 1404] your feelings as to the death penalty with regard to punishment. Do you have an opinion one way or the other as to the death penalty?

A. I believe in it.

Q. Are you telling me you have no conscientious, religious, or moral scruples against the imposition of the death penalty if you think it is a proper case for it?

A. Right, I don't.

Q. And you can participate in a jury verdict that did return a death penalty as punishment, is that right?

A. Yes, sir.

Q. There are some principles that apply that I want to go over with regard to the functiong [sic] of the punishment phase of the criminal trial. As I told you, the State must prove to you beyond a reasonable doubt that the defendant is guilty of the crime. The State must

further prove to you, if they seek the death penalty and the State has informed the Court of its intention to seek the death penalty, that the State must prove to you on the punishment phase of the trial that the death penalty is the proper punishment. That the Defense has no burden whatsoever. If [p. 1405] the State does not prove to you beyond a reasonable doubt that the death penalty is the proper punishment, then you're obligated as a matter of law to return life imprisonment as the punishment in this case. Do you understand that?

A. Yes.

Q. We are seeking to find twelve people who even if they do convict someone of capital murder will not have some predisposition or are locked in as to what they feel the proper punishment should be. The reason for that is there are special issues that are presented to the jury on the punishment phase of the trial that will bring about presentation of testimony to the jury. There will be further evidence in the punishment phase that will in some way cause the jury to answer the issues one way or the other, and it is the way that the jury answers those issues that determine what the punishment is, but we are looking for twelve people who have an open mind. We do not want twelve people to say if you take somebody's life, you automatically get the death penalty, and, likewise, we don't want twelve people that say they could never [p. 1406] participate in a verdict in which the death penalty was returned. So we are looking for people to say if the case is a proper case for the death penalty, that they could take part in that verdict, but they are not automatically predisposed for voting for the death penalty

because someone's life has been taken. Do you feel you could have an open mind on those issues?

A. I think I could.

Q. Okay. You are familiar from your jury service in a civil case with the concept of special issues. That is how the case was presented to you in the civil case. In the punishment phase of a capital murder trial, there are at least two special issues submitted to the jury. Possibly three. And those two special issues are pinned to the bulletin board to your right. If you would take a moment to read those issues, and we will talk about them further.

A. Yes, sir.

Q. Do you have any difficulty understanding those first two, Ms. Gaskill?

A. No, sir.

Q. First of all, let me tell you something about these special issues. There will be no [p. 1407] definitions that I will give you as to any terms. It will be a matter of you using your common sense in deciding these issues. In Special Issue No. 1, we are asking you whether the conduct of the defendant was committed deliberately and with the reasonable expectation that the death of the deceased or another person would occur. Now, in deliberating or in considering the first special issue, I think it's obvious we are asking you to think back or reflect upon the testimony that you would have heard at the guilt phase of the trial with regard to the defendant taking the life of another person. We are asking you to think back on that testimony and answer two questions. Number one, did the defendant in embarking upon this conduct of the

death of the deceased, was it committed deliberately, and, number two, did he reasonably expect that the death of the deceased would occur. Those two questions, was it done deliberately, and did he reasonably expect that the death would occur? Obviously, there are many situations that might cause you to answer this issue in a different manner. You are faced, on the one hand, with a cold-blooded [p. 1408] killing versus, say, a person walks into a store with a pistol, takes money from a clerk, and guns him down in cold blood with no provocation, no, nothing being done by the person before he was killed. Obviously, in that situation, you very well might say yes, I believe he took the person's life deliberately, and yes, I believe he reasonably expected to take that person's life. On the contrary, you may be faced with a situation where a person goes into a store, and let's assume it is a young person that has an ill family at home and has no way to get any money, and out of frustration, he goes in the store with a pistol to get money but not intending to hurt anybody. He goes in the store with the pistol and takes money from the clerk, intending to take money from the clerk. He doesn't get that far because as he walks in the door, he slips on a jar of broken baby food on the floor by the door and his feet fly out from under him, and the gun hits the deck and automatically discharges and hits the clerk and he is killed. In that situation, he is guilty of capital murder because he committed aggravated robbery, and the clerk is killed. But in viewing [p. 1409] that situation, you might say, "I don't think he expected to kill the clerk. He intended to rob the clerk, but he didn't intend to take another person's life, so it is no." You may have another situation where the robber starts out the

door and the clerk starts to chase him and shoots him in the foot. He doesn't intend to harm him. He only intended to shoot him in the foot, but he doesn't mean to harm him. When the clerk gets hit in the foot, he falls and hits his head on the counter and he dies. In that situation, you might say he deliberately intended to shoot him, but he didn't reasonably expect him to die. You might consider those situations with yes against a no answer to anyone on the jury. All yeses mean death by lethal injection. A yes answer requires a unanimous verdict. All twelve must agree. A no answer requires a verdict of at least ten. A vote of ten or more is enough to give a no answer which means life in the penitentiary. Do you have any problems with that first issue we are talking about?

A. No, sir.

Q. Let's go to the second issue. It is asking you [p. 1410] to predict the future. We are asking you is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society. Once again, no definitions will be given to the jury by the Court. We are asking you, number one, is it more likely than not? Is it probable that the defendant will commit criminal acts of violence. Criminal acts of violence mean many, many different things. It can be from a Class B assault where someone touches you on top of your head and you find that act offensive. That is a Class C assault to the other extreme of capital murder with the full gambit in between of assaults, robberies, kidnappings, murders, and even including the crime of violence against property. If someone were to run a Volkswagen across your front porch and knock out one of the pillars, that is a crime of violence against property

and would fall within that group. The last question is would the person probably commit these criminal acts of violence to the extent that he would constitute an ongoing or continuing threat to society. Not only society as you and [p. 1411] I know it walking the streets in Houston, Texas, but would he also possibly constitute a continuing threat to other persons that he might be around in the penitentiary, guards and other inmates. So, you know these are terms that are to be defined by your own conscience. Once again, the State has the burden of proving to you the answers to these issues should be yes. If they don't carry that burden of proof, the answer should be no. The defendant should get life instead of death in that situation. Do you understand that, Ms. Gaskill?

A. Yes.

Q. Any questions to this point?

A. No, sir.

Q. These two special issues will always be presented on the punishment phase of a capital murder case. They will always be here. There is a possibility that a third special issue may be presented, and that is a special issue dealing with a comparison of conduct resulting in the death of the deceased, a comparison of the conduct between the defendant and the person who is killed. We are asking you, number one, if raised by the evidence. It does not require [p. 1412] that ten witnesses testify to the same thing. All that is required is testimony by the one witness to one line of testimony. If it is raised by the evidence, you have to present this special issue in the charge. What is raised by the evidence. Did the conduct

of the defendant in killing the deceased take place in response to provocation by the deceased, if any? The extent that the defendant acted unreasonably or did not act unreasonably in taking the life of that person. So, we are asking you to compare the actions that the defendant took in taking the life of the deceased in comparison to whatever actions the deceased took before he was killed. This automatically cuts against my grain and possibly your grain in that we are more or less asked to evaluate the actions of a person whose life has been taken possibly in defending his property, but that is not what we are trying to do. We are not saying that a defendant in a capital murder case has a right to self-defense. He does not. By walking in that store and provoking the difficulty, he forfeits the right of self-defense, and if the clerk would pull the [p. 1413] gun and fire at him and he fires back and shoots and kills the clerk, he can't say, "I shot in self-defense because the clerk fired first." That is not at all what the situation is nor are we trying to infer any criminal responsibility for this happening to the deceased. What we are saying and what the legislature, I think, intended to say is that we are asking you to review this conduct to give you one other item of deliberation for you to determine whether or not this defendant deserves the death penalty or deserves life in the penitentiary. This in some ways mitigates in the situation or in the direction that the defendant should receive life and not death. Now, let me give you a couple of examples I think may possibly clear this up.

The issue was was [sic] the defendant unreasonable in taking the life of the deceased based on provocation, if any, that the deceased did before he was killed. Do you understand what that issue is?

A. Yes.

Q. Assume we are back to our first hypothetical situation where the person has walked into the [p. 1414] store to take money because he just has to have the money for his family, but not intending to hurt anybody. He has an old pistol that has one bullet in it, and he walks in the store and takes the money from the clerk, and just as scared as the clerk is, he takes the money from the clerk and puts the pistol back in his belt and turns to walk out of the store. He is one foot from the door. He reaches out for the door. The clerk pulls a pistl [sic] out from under the counter. He shoots and fires and hits the defendant in the shoulder or the leg and he falls. The clerk comes running at the defendant with the pistol in his hand and the defendant sees the arm is going back, and he will be killed. So, he pulls the pistol from his belt and fires and shoots the clerk and kills him. That person is guilty of capital murder. He is going to get the death penalty or life in that situation. Okay. There is no way around that. The question then becomes were his actions unreasonable in light of what the clerk did? Did the clerk in some way contribute to or provoke the situation? You have got a situation where if the clerk had stood [p. 1415] there, the man would have walked out of the store and nothing would have happened to him. The clerk pulled the pistol and more or less assisted in the provocation by pursuing the man when the man was almost out the door and the man had done nothing to him. Once again, we are not defending what the defendant has done, but we are asking you to compare these courses of conduct to decide if the deceased, number one, provoked the situation, and, number two, in provoking the situation, was

the taking of his life unreasonable based on what he did or was it reasonable? You may find it's unreasonable or you may find that it is not unreasonable, but it is reasonable. Here, once again, what we are looking for are people who will reflect upon the testimony that is presented to answer this issue one way or the other based on the evidence that is presented. Once again, we are not in any way trying to apologize for or defend what the defendant has done in taking the clerk's life. It will be our saying and what the legislature is saying is this is an additional area for the jury to deliberate upon in determining whether a person should live or [p. 1416] die. Do you understand what I'm driving at in this issue?

A. Yes.

Q. Do you feel you would have an open mind to all these issues if you were a juror in this case?

A. Yes, sir.

Q. This concludes what I want to talk to you about. As I told you, both lawyers get a chance to talk to you. Mr. Hobbs, an Assistant District Attorney, will be for the State, and Mr. Thornton will be for the Defense.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q. Good morning, Ms. Gaskill.

Which store did your husband manage while he was working as a manger for a grocery store?

A. It was a Gerland's chain.

Q. Gerland's?

A. Yes.

Q. While he was the manager of that Gerland's supermarket, was it robbed in any manner?

A. As long – they were robbed, yes. As long as [p. 1417] we have been married, he has never been at the store while it happened or anything like that.

Q. Now, the judge has told you as a member of the entire panel on Monday that the State's burden of proof is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it were beyond all doubt, I think you would have had to have been present and actually saw what happened to remove all doubt from your mind. So, it's an impossible burden because if in that instance, you couldn't be a juror. You would be a witness. Do you have any problems with that?

A. No, sir.

THE COURT: Let me ask one question, Mr. Hobbs. Because of your husband's association with Gerland's and the fact that Gerland's has been robbed, maybe not while your husband was there one way or the other, would it cause you to be – would it cause you to unfair or partial to one side or the other because of the fact that that took place?

A. That is a little tough to answer because while it never happened while he was there, there was always the possibility that it could, and I [p. 1418] would think how would I feel if somebody walked in and robbed him and he died from it.

THE COURT: Obviously, that is certainly a valid concern on your part. Once again, it is obvious that this defendant, Gary Graham, was not involved in that robbery.

A. Right.

THE COURT: We are talking about a different situation. We also talked about the fact that the State must prove to you beyond a reasonable doubt that the defendant is guilty and that you must afford this defendant the presumption of innocence until or unless and until the State carries that burden of proof. Do you think that you could hold the State to the burden of proof that the law demands?

A. I think I could.

THE COURT: Do you feel that because of the instance that you would lessen the burden or you would be more prone to vote yes because of the background that your husband has had?

A. Now, that I don't know, really know.

THE COURT: Do you think that might be a possibility?

[p. 1419] A. It's hard to say. Like I said, if something had really happened and he would be hurt, I could see where I could be biased, and he is no longer in the grocery business. I don't have that worry anymore.

THE COURT: And there would be nothing in your past that would cause you to not be fair and impartial?

A. I don't think so.

THE COURT: You are saying then that you feel you could be fair and impartial to both sides?

A. Yes.

THE COURT: You could follow the law as I gave it to you in the charge?

A. Yes.

THE COURT: Mr. Hobbs, you can continue.

EXAMINATION BY THE STATE, CONTINUED

QUESTIONS BY MR. HOBBS:

Q. Your husband is presently working for A & W?

A. No, sir. It's a delivery service.

Q. Okay. There are two parts of the trial. [p. 1420] Guilt-or-innocence. The defendant is found guilty. Then, there is the punishment phase of the trial.

You understand our law when a person reaches the age of seventeen, that person is considered an adult under the law of the State of Texas? Would the fact the youth of an individual still considered an adult under the laws of the State of Texas – would that cause you to render a verdict one way or the other simply because of that person's age?

A. No, sir.

Q. You could look at that person, whether he was young, old, or middle-aged, as an equal individual under the eyes of the law?

A. If they are seventeen, yes, sir.

Q. Okay. Now, I want to ask a question. My next question, and those questions concerning questions 1, 2, and 3. I'm going to give you a hypothetical situation in which I will ask questions of you later on.

This is the hypothetical situation that I would like to deal with. Let us assume that this store – I mean that this courtroom is a Seven-Eleven store, and let us assume that [p. 1421] there are some people in the store. Among the people in the store is you and where you are sitting right there, you have a little bit of a problem seeing Mr. Pollinger over off on the other side, the bailiff. Let us presume that there is something in the store that puts you in that same position, that you can't see. Let us further presume that he is at the cash register there. It's near the end of the shift and that he has taken the money out of the register and placed it into a commercial drop bag and is restocking the shelves, and he is holding a box, and that bag is partially sticking out of his pocket. Furthermore, besides yourself and Mr. Pollinger, Mr. Thornton is there; he's present in the store in an area about where he is here. Let's furthermore presume that Ms. Slessinger, the court reporter, is sitting in the jury box area, say, something like this with an obstruction in the store, something blocking her view about waist high, about like this rail is. The four of you are present in the store. I'm going to be the perpetrator of the crime. I come in and I see Mr. Pollinger behind the register, behind the [p. 1422] counter with the box stocking items on the shelf. I can see the money bag in there, and I know what it is, and I go and I start to grab the bag, and when I – just about the time I get it, Mr. Pollinger sees me and still holding the

box, he moves away from me. When he does that, I grab him with one hand and I take – come up with a pistol from the other. Well, Ms. Slessinger hasn't paid much attention to what I look like other than general clothes, but when she sees that gun, she sees the gun and she doesn't see anything else but the gun, and she hits the floor. Let us further presume that you hear a commotion, but like you are now, you can't see what is happening. Further, that Mr. Thornton sees me also, and he looks at me. He hollers and when he hollers at me, I turn to him and I look at him, and when I turn and look at him, Mr. Pollinger breaks away from me. When he does, I turn from Mr. Thornton and immediately back to Mr. Pollinger, shoot and hit him in the chest killing him and I run off. Now, you understand under the laws of the State of Texas, I have committed the offense of capital murder, murder during the course of [p. 1423] committing a robbery. Now, you understand that robbery doesn't have to – you don't have to get any property to have a robbery. If I came up to you and demanded your money, held a gun on you, and a police officer came up behind me and stuck a pistol to the back of my head and said, "Drop it," I have committed the offense of aggravated robbery. Any problem with that?

A. No.

Q. Now, in our example, let us say that I get caught later on and let's make it tough. I don't – they don't get the gun I use to shoot and kill Mr. Pollinger with. I didn't leave any fingerprints because I didn't touch anything there or if I did, there is nothing there, and I didn't get any property or if I did, they didn't find any on me. So, let us further presume that the State has put on its case,

and they have proved up that it occurred in Harris County and that it was on a specific date and during the course of committing a robbery, and that Mr. Pollinger's death was the result of being shot with a gun. Let us further presume that there is only one thing that is necessary and I am being tried for capital murder. They [p. 1424] have got to prove it to me.

So Mr. Thornton takes the stand and testifies that, "Yes, I saw Carl Hobbs shoot and kill Mr. Pollinger on that day. A single eyewitness. Could you, if you believed beyond a reasonable doubt that person base a conviction for the offense of capital murder on the testimony of a single eyewitness?

A. If I believed the person testifying, yes.

Q. Okay. Would you require that proof as to that issue to be greater than as to the other issues if you believed it beyond a reasonable doubt?

A. Yes, sir.

Q. You would require a greater amount of proof beyond a reasonable doubt?

A. Yes, sir.

Q. In all instances?

MR. THORNTON: Your Honor, I would object to that. The witness has already answered the question.

THE COURT: Would you repeat the question, Madam Court Reporter, that was voiced?

(At this time, the question was read back by the court reporter.)

[p. 1425] THE COURT: Let me ask a few questions of you, Ms. Gaskill. Obviously, Mr. Hobbs has asked you about the fact if there is only one eyewitness by the State, could you convict on the testimony of that one eyewitness alone if you believed that one witness beyond a reasonable doubt. You may not believe that witness beyond a reasonable doubt, but assume for argumentative purposes that you do believe that person beyond a reasonable doubt. Could you convict on the testimony of that one witness alone?

A. Yes, sir.

THE COURT: Okay. The objection is sustained. Move on to something else.

Q. Thank you.

As to Special Issue No. 1 whether or not the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another person would occur. Of necessity, we are going to have to look at the facts of the case that we have just got out of the guilty stage with.

A. Right.

Q. You are going to have to look in the example of [p. 1426] what I did to decide whether or not it was deliberate. It's not going to be a definition of what deliberately is. Webster defines it as being a willful or voluntary act. It doesn't mean premeditation. I can deliberately walk over to this fountain and get this cup. That is a deliberate act, without much thought.

Do you have a problem with that?

A. No.

Q. Now, a reasonable expectation. What I did, was there a reasonable expectation that the death of Mr. Pollinger in the example would result? I shot him in the chest. I might find that's a reasonable expectation. You may or may not. Had I shot him in the foot as in the judge's example there, there might be a different expectation that you would look at. It depends on the circumstances.

Could you answer that question based upon your view of the testimony and considerations of Special Issue No. 1?

A. Could I answer the question?

Q. I'm not asking you to do it. I'm asking you, could you look in this phase of the trial? We are in the punishment phase, and in the example, [p. 1427] I had been found guilty of capital murder. Now, what you have to look at is what did I do. Was it a deliberate act and was that act and my actions in causing the death of the deceased, was there a reasonable expectation on my part that that death would result from my actions by looking at the evidence. Once again, the State has the burden of proving to you as a juror that that answer should be answered yes beyond a reasonable doubt.

Do you think that you would be able to look at those facts and answer that question, define for yourself deliberately and reasonble expectation?

A. Yes, sir.

Q. Now, as to Special Issue No. 2, whether there is a probability that the defendant will commit criminal acts

of violence that will constitute a continuing threat to society. If you remember what the judge talked to you about, society includes prisoners and so forth. Probability is not defined. It doesn't mean absolutely, one hundred percent that it is something that is going to occur. The words likely or possible come to my mind. Do other terms or definitions [p. 1428] come to your mind in thinking about probability?

A. No.

Q. Now, probability. What are the chances that the defendant in that example, that I will commit criminal acts of violence in the future? Criminal acts of violence. Can I define those for you. It can be something very minor. I can rip off the blinds from the window, break her machine, or go out and shoot Mr. Thornton, or commit an aggravated robbery. A murder. A capital murder. This phase of the trial, needless to say, the actions in the first part of the trial, what I did in this specific instance may give you some insight in how I might or may not react in the future. Okay. As to this special issue, the judge can allow the jury to hear testimony if he deems it relevant and material to the prior criminal record of the defendant, if he has one, to other criminal acts of violence, if there are any, to reputation testimony, whether it be good or bad as to that individual that would help you in answering along with the facts of this question of probability. And whether or not that would be a continuing threat to those [p. 1429] people. Even to those people that might be in prison.

Do you have a problem with that?

A. No.

Q. Now, Special Issue No. 3 is somewhat a little bit more difficult, but really not so. When we look at Special Issue No. 3, first of all, if it's raised by the evidence. Even if it is raised, even if it's very small, under the law, the judge has to put it there. The law says he has to put it there. He is not commenting that he believes it's there or not. He has to put it there, and you have to answer it as a potential juror. Here, let's break it down. Provocation first, if any. You have to decide in looking at the facts of the case whether or not what in this instance in the example whether the deceased, Mr. Pollinger, what did he do. Did he do anything, first of all. Then, what he did, was that provocation, and provocation won't be defined. You have to decide in your mind was pulling away from me provocation? Okay. Then, you have to look at whether or not that action was reasonable or unreasonable, my actions in shooting him because of what he did. Was it [p. 1430] reasonable or unreasonable? You may find that it was not unreasonable or that it was depending on the facts. Let's go to the example – maybe to an extreme where the judge gave you about the guy that goes out of the store, is almost out, and hasn't shot. He was shot in the back and in the leg, and the clerk is running up with a gun. Well, there you might say that what actions, what did the clerk do? Well, he grabbed the gun and shot the guy twice, shot me twice, and he was coming up to me like he was going to shoot me again. I shot and killed him. I'm still guilty of capital murder, but was there provocation on the part of the individual that got killed, and what in relation to that action was the actions that I took reasonable or unreasonable in relation to that action.

Do you have a problem with that?

A. No.

Q. Now, if you believed beyond a reasonable doubt that those answers to Special Issues 1, 2, and 3 should be answered yes, if all three were submitted, knowing that those answers, and it was a unanimous verdict of the jury, that that [p. 1431] would result in the death penalty being imposed, could you vote yes?

A. Yes, sir.

Q. Okay. Ms. Gaskill, is there any problem with anything we have discussed thus far that – or something that I confused you with that you would like clarification on?

A. No, sir.

Q. Is there any reason why you feel you couldn't be fair both to the defendant and to the State?

A. Why I could or couldn't be?

Q. Is there any reason you could not be fair that you know of that we don't know of?

A. No, sir.

Q. Okay. Thank you.

THE COURT: Mr. Thornton, you may proceed.

EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q. Good morning, Ms. Gaskill. My name is Chester Thornton. I am a defense attorney, one of the co-counsel

representing the defendant in this case, Gary Graham. I have a few questions I [p. 1432] want to ask you, and I want you to be as open and candid as possible. I'm not here to try to embarrass you or persuade you on your beliefs or anything. That is not my point. My point is to try to find out how you fee, how does Billie Diane Gaskill feel about certain issues. Okay?

A. Okay.

Q. I notice that you have not been a victim of a crime and neither been a witness in a criminal case before. Right?

A. Right.

Q. And you have never served on a criminal jury before?

A. No.

Q. Can I ask you, what was your first reaction when you found out you had been called as a juror on a criminal case?

A. I didn't have any reaction. You just come down. This is the second time this year.

Q. You realize your civic responsibility and come down?

A. I don't have a choice.

Q. What was your response, say, when you found out you might be potentially sitting on a capital [p. 1433] murder case?

A. Well, you don't really have a response until you start going through all of this because you don't know; at least I didn't.

Q. Was the mere fact it was a capital murder case, did that light up any light in your head or make you think differently on your responsibility?

A. No, sir.

Q. Okay. I want to get into now on your beliefs concerning capital punishment, and I want you to look at it from the perspective on how you formed your beliefs and the basis of your beliefs, and the reason I'm saying that, how you came to believe the way you did and why you believe the way you do, and I want you to view it in the respect of being candid and honest with you. How you feel about it is not going to make me, cause me to look down on you in any way or cause me to look up to you in any way. I want to know how you feel and in that vein, could you tell me, Ms. Gaskill, how do you feel about the death penalty in relationship to society?

A. I feel like it is needed.

Q. Okay. In what way? In your own words, how is it needed?

[p. 1434] A. If someone that was close to me were killed, I would like to know that they were not – they did not just get away with the crime. I would like to know they were punished for it.

Q. Does the individual have to be close to you, the person that was killed?

A. I can relate to it more if they are close to me.

Q. Okay. Would it change how you would maybe deliberate on a person as far as if he is innocent or guilty if he is not close to you, taking it out of the personal realm, the person that died, he is not close to you, right?

A. Right.

Q. You don't know the deceased, do you?

A. No.

Q. So, this is an impartial situation?

A. Right.

Q. You, from that impartial situation, how would you view the death penalty in that respect?

A. I believe it's there for a reason.

Q. What reason do you think?

A. To punish people.

Q. Okay. Do you think that it in any way deters crime or maybe keeps somebody else from committing [p. 1435] similar conduct?

A. I think it could, yes, sir.

Q. How do you think you might have formed those beliefs? How do you think you might have arrived at your beliefs?

A. I really don't know. It's just the way I feel. I couldn't know why I feel it or anything else other than I believe there should be a form of punishment.

Q. Now, we are not talking about a form of punishment. We are talking about the death penalty in this case.

A. Right.

Q. We are not talking about anybody else. We're talking about Gary Graham. Okay, and the effect potentially, the effect of your decision on this individual here. That is what we are talking about. Do you feel that just because a person faces a mandatory punishment of either life or death, do you feel that that might affect you on how you'd deliberate on any of the issues, the facts that might be presented before you if you were selected as a juror? Do you understand me?

A. No, sir.

[p. 1436] Q. Okay. Does the mere fact that a person faces life or death, would that in any way affect on how you would look at the evidence that is presented before you answer?

A. Well, of course it would.

Q. How would it and in what way would it affect you?

A. Well, you would know that you have somebody's life in your hands, and depending upon whatever evidence you are presented, what my judgment from that is his life will be in my hands.

Q. Are you saying that you would have to be absolutely sure about the evidence before you could, say, make a decision?

A. As to somebody else's life, yes.

Q. I don't want to put – I say absolutely, I don't want to put it in my words. What would your words be?

A. I would like to be absolutely sure, yes.

Q. Okay. Do you think that you would be able to keep an open mind about it, keep an open mind about the whole, entire ramification of the whole decision that you would have to make from the point of what evidence is being presented to you as far as what you.would want to know [p. 1437] about the individual? Could you keep an open mind about that?

A. Yes, sir.

Q. And in reaching a decision on whether a person should live or die or whether a person should be removed from society or not, what would you like to know about that individual? What – how would you – what would you need to help you make a decision like that?

A. Well, it's hard to say.

Q. Okay. Well, we have to say because I want to know how you feel because, as the judge explained, we don't want a jury that is just – because of the nature of the crime, the seriousness of the crime, that they would automatically vote one way or the other, and that is why I want to find out your feelings.

A. How can you find out anything until you hear the evidence?

Q. What type of evidence do you want to hear? What type of things would you want to hear? If you don't know, okay.

A. I really don't know. If the evidence is presented and it proves that he did it, you know, what else can you do?

[p. 1438] Q. Well, that is what I am saying. We are not just talking – we are taking it out of guilt-or-innocence. Do you understand that I'm talking about punishment and what would happen to the individual if he is found guilty. Do you understand that I am not – assuming that he is already guilty and that I had to ask you your feelings concerning the death penalty because of the possibility this might happen. Okay?

A. Okay.

Q. Are you telling me that just because a person has been found beyond a reasonable doubt to be guilty of the offense of capital murder that he should receive the death penalty? Is that what you are telling me?

A. If it's like he deliberately did it and everything else, yes, sir.

Q. Okay. When you say deliberately did it, what do you mean?

A. Okay. Like just to say he walked in and killed somebody.

Q. Okay.

A. Yes.

Q. Yes what?

A. Yes, I would say he is guilty if there is a [p. 1439] witness to that, but if he was provoked, then yes, I could have a reasonable doubt.

Q. Okay. Let's say it has been found – it's beyond a reasonable doubt. It has been proved beyond a reasonable doubt to you. Okay?

A. Okay.

Q. That he did commit the offense of capital murder.

A. Okay.

Q. You found that beyond a reasonable doubt in your mind. You were satisfied in your mind. Okay. I am asking you in consideration of punishment, punishment, okay?

A. Okay.

Q. What would be your feelings then?

A. It would be the same thing. Okay, he is found guilty, but why did he do it?

Q. Okay. Would you have to know why he did it or would you want to know why he did it?

A. If he did it in cold-blooded murder, yes, I could say he was guilty, but if after he is found guilty, if for some reason he was provoked into what he did, I wouldn't think that he should get the death penalty then.

Q. You are saying if he was provoked in what he did?

[p. 1440] A. Right.

Q. I'm trying to see in my mind – we are already past whether he did it or not. You have already been satisfied in your mind, assuming that the facts showed

that he did indeed do it, we are trying to find out what should happen to this individual. Should this individual live or die, and I am asking you because of the fact that the defendant has been found to be guilty and you are satisfied in your mind beyond a reasonable doubt that he did commit the offense. All right? And when it comes down to what should happen to the individual, that is what I am asking you, as far as your views on it. Are you saying because you found him guilty that he should automatically receive the death sentence?

MR. HOBBS: Your Honor, I object as being an improper question.

THE COURT: Let me talk with Ms. Gaskill. I understand, ma'am. I can see how you are confused. We talk about the fact you have to have an open mind on all these special issues, not only to the deliberately and reasonable expectation but also as to the defendant's probability of committing criminal [p. 1441] acts in the future, and also whether or not there was provocation by the deceased before the deceased's life was taken by the defendant. Could you keep an open mind on all of these issues? Could you do that?

A. Yes, sir.

THE COURT: You would not be predisposed to give the death penalty just because you found somebody guilty of capital murder?

A. No.

THE COURT: Ask your next question.

EXAMINATION BY THE DEFENSE, CONTINUED

QUESTIONS BY MR. THORNTON:

Q. I wasn't trying to get you confused or anything. I have to be sure about your answers on that particular issue. Do you understand that? Just like the judge. When somebody says just because you did, we are going to do this. That is what I have to find out. You clarified that in my mind as far as you being open-minded about it. Okay.

Now, going down to Issue No. 3, and you mentioned the word provocation. Do you [p. 1442] understand that fully, that issue, fully? Do you understand that?

A. I think I do.

Q. Do you have any problems with anything you might want me to clear up or ask me about it?

A. No, sir.

Q. Okay. Is there anything that I might have asked you that might have confused you or you might have questions about?

A. No, sir.

Q. Okay. We have no further questions.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the Defense?

MR. THORNTON: May we have a second?

THE COURT: Yes, sir.

MR. THORNTON: The Defense will accept, Your Honor.

THE COURT: Will you stand, Ms. Gaskill and be sworn as a juror?

(At this time, juror sworn.)

THE COURT: Ms. Gaskill, this will conclude the necessity of your presence here today. We anticipate that the rest of the jury [p. 1443] selection will take probably the balance of the week. We anticipate starting the actual testimony in the week next Monday, which will be the 26th. We have your home and business numbers that you can be reached. Mr. Pollinger, the bailiff, will be contacting you before the end of the week to let you know that we will be starting on the 26th.

A. What if I had a vacation scheduled for that week?

THE COURT: Can it be rescheduled up until a later time?

A. I should be able to change it.

THE COURT: Anyway, we will be contacting you at the end of this week to let you know we will be starting on the 26th. Anyway, there is no need for you to go back to the jury assembly room. You are free to go back to work at Shell. Ms. Hamilton, the clerk, will provide written verification for the people at Shell to let them know you have been here on jury service the last two days, and you will begin your jury service as a juror in this case on the 26th. We anticipate it will take a week to try the case. Thank you very much. You are excused.

[p. 1625] MR. REED D. ARNEY, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q. You know Mr. Braddock?

A. No.

Q. I noticed you are a teacher, and he is the director of security.

A. I didn't realize that.

Q. I have gone out to Cy-Fair on occasion. I have a friend, Bruce Robertson, who handles the seniors – it's kind of a variety show that they put on on a yearly basis, and I judge which act is better and all that. It's a good school, and they seem to be nice kids.

Mr. Arney, I noticed in looking at your juror information form that you have been a regular around the courthouse complex as a juror. I take it from your background that you have no problem with the concepts I spoke about yesterday?

A. No, sir.

Q. Okay. What subject do you teach out at Cy-Fair?

A. History and English.

[p. 1626] Q. Would it be an insurmountable burden for your students if they needed a substitute teacher for a week if you were to serve as a juror?

A. No, sir.

Q. I'll bypass any discussion of the principles yesterday because I am sure they are familiar to you. Did you happen to know Andy Tobias with the District Attorney's Office?

A. No.

Q. Andy is a prosecutor from Marlin. My wife is from Waco, which is right around the corner.

Anyway, as I told you yesterday, the defendant, Mr. Graham, is charged with the offense of capital murder, and by virtue of the fact that he is charged with capital murder, he runs the risk, if he is convicted of the offense of capital murder, of being sentenced to the death penalty by the jury who serves in this case.

That is why we have to take the time and consideration of each juror to make sure that they could be a fair and impartial juror to both sides. You are familiar with the two-stage trial system we have in criminal cases?

A. Yes.

[p. 1627] Q. In the first stage in a capital murder case is merely to determine whether or not – I don't want to say merely, but it only to determine if the defendant is guilty of the offense of capital murder.

We then move to the punishment phase of the trial, and the reason that I make this point is because we must ensure that we have twelve people who will have open minds as to what punishment should be rendered if they find the defendant guilty. That is assuming that he is found guilty. That it may be an improper assumption. The jury may not find him guilty, and the punishment phase will not be reached. However, in the interest of preparing

for all contingencies, we would have to be considering after the defendant after the defendant had been found guilty and we move to the punishment phase.

Once again, I make this assumption that we must ensure that we have twelve people with open minds and we have twelve people who will not say, "Well, I have found him guilty of capital murder, and I have found him guilty of taking another person's life, so I'm automatically going to give him the death penalty [p. 1628] an eye for an eye and a tooth for a tooth sort of thing." That is not to say that we disagree with those people, but we merely cannot have those people on the jury in a capital murder case because there is more testimony that can be heard on the punishment phase of the trial that can influence the jury one way or the other as to what punishment or verdict they reach.

Likewise, we need to have twelve people who can, if they consider it to be a proper case, vote for the death penalty if they are convinced beyond a reasonable doubt that it's the proper punishment and that they reach this decision after all of the testimony is presented on the punishment phase of the trial. Do you feel, sir, that you have any conscientious, religious, or moral scruples against the imposition of the death penalty as a punishment in a case that you thought it would be proper?

A. No.

Q. I take it, then, Mr. Arney, what you are saying is if you felt it was a proper case, you could vote for the death penalty, is that right, sir?

A. Yes, of my own conscience beyond a reasonable doubt.

[p. 1629] Q. Obviously, as I said, it is a conscientious belief that we all have one way or the other. There are principles that apply in the punishment phase of the capital murder trial that parallel the guilt-or-innocence phase. One principle is the burden of proof that the State must bear.

In the guilt phase, as I am sure you are aware, the State must prove to you beyond a reasonable doubt that the defendant is guilty.

On the punishment phase, the State must prove to you beyond a reasonable doubt that the death penalty that the State is seeking is the proper punishment. In other words, you are thinking as you go into the punishment phase should be more in line with life in the penitentiary until the State proves to you beyond a reasonable doubt that the punishment should be the death penalty and not life in the penitentiary. The jury, in determining what the proper punishment should be, does this function by the manner in which they answer special issues that are submitted to the jury by the Court. I do not take a blank piece of paper and slide it under the door and say write life orn [sic] death. As I am sure from looking at [p. 1630] the civil case you served on involving, I assume it was a personal injury case, from your notation that the jury in this case reached its verdict by the way they answered special issues.

And the same is true on the punishment phase of a capital murder trial. This is the only type of criminal trial other than possibly a mental competency hearing that

special issues are submitted to the jury. The jury answers those special issues either yes or no. If the jury answers all the special issues yes, the defendant receives the death penalty. If the jury answers one or more or all of the special issues no, the defendant receives life in the Texas Department of Corrections. A yes answer by the jury requires a unanimous verdict just as it did on the guilt phase of the trial. A no answer, in paralleling the civil case you served on, requires a vote of ten or more. It does not require a unanimous verdict for a no answer to be determined. There will be no definitions in the Court's charge to aid you in your interpretation of the special issues that were submitted. They are matters that will involve using your common sense and your common [p. 1631] definitions. I will talk with you a little bit about what I think these terms mean, and the lawyers will talk to you about what they think the terms mean, but we defer to your individual interpretation.

There are a minimum of two special issues that are submitted on the punishment phase and a maximum of three. As I said, the answers that are given to these as to the defendant – I would like for you, if you would, to turn to the right and review the two special issues that are pinned to the bulletin board.

A. Okay.

Q. Those are the issues that are always presented on the punishment phase of the trial.

Special Issue No. 1, obviously, is calling you to reflect upon the testimony that you heard in the guilt phase with regard to the defendant taking the life of the deceased. It's testimony you will hear on the guilt phase because

you will render a decision, should you serve as a juror, as to whether or not the defendant did take the life of the deceased. So we are asking you, in reviewing that course of conduct that resulted in the death of the [p. 1632] deceased two questions.

Number one, did the defendant enter into that course of conduct deliberately, and, number two, did he reasonably expect or should he have reasonably expected that he was going to take the life of the deceased or the life of another person. Deliberately, once again, will not be defined. In my limited vocabulary, I interpret deliberately to mean a person's conscious objective, his intent to do something. It is a voluntary act on his part. It is not an accidental action. It does not accidentally equate with premeditated. In my interpretation, it does not have to be a showing of premeditation for this. For deliberately to be the situation, if it's a person's conscious objective to do something and he does it. You may have a different interpretation on that. Reasonable expectation, likewise, will not be defined, but we are viewing whether or not the defendant reasonably expected to take the life of the deceased when he entered into this conduct or should he have reasonably expected to do so? I think there are possibly varying fact situation that I might give you that might cause you to see [p. 1633] that there are many situations that may cause different answers by you as to this special issue.

Assume two hypothetical situations or three. Assume, number one, we are talking about a person who goes into a Stop 'N Go with an old pistol and one bullet in the pistol, and he goes in that Stop 'N Go to take money because he has a sick family at home and his wife

and family are ill and he has lost his job and he is at the end of his rope. There is no other way he can think of to get money. He goes in the store with this pistol with one bullet to take money from the clerk but not to do anyone harm in the store. He is not intending to hurt anybody, but he goes in the store with the pistol drawn, and he slips on a wet portion of the floor right inside the door, and his feet fly from beneath him. He hits the floor and the pistol flies from his hand and the pistol hits the floor of the store and accidentally discharges, and, as fate would have it, the bullet strikes the clerk behind the counter and the clerk is killed.

In reviewing that situation, you might [p. 1634] say the person deliberately entered the course of conduct in which the robbery took place or was taking place; however, he did not, based on his frame of mind and what happened in the store, reasonably expected that he was going to take the life of that clerk. You very well might answer that special issue no, he did not reasonably expect to take the life of the clerk.

However, you might be faced with another situation where the person walks in the store, takes the money from the clerk, and then with a smirk on his face, guns down the clerk in cold blood as he stands defenseless behind the counter. In that situation, you might very well answer yes, I believe that he entered into the course of conduct deliberately and yes, I believe he reasonably expected to take the life of the deceased.

The third situation might be one where the person takes money from the clerk and turns to run from the store, and the clerk starts to chase him. He fires at the

floor and hits the clerk in the foot, and the clerk falls and hits his head on the counter and he dies from the wound, hitting his head on the counter. In that [p. 1635] situation, you very well might say he intended to rob the store. It is a deliberate act on his part to shoot the clerk in the foot, but he could not have reasonably expected the clerk to have died from the foot wound. There are many situations that might dictate differing answers to you in this first special issue.

The second special issue deals with a prediction on your part as to the future of the defendant. We are asking you if the defendant probably will commit criminal acts of violence in the future that will constitute a continuing threat to society. There will be no legal definitions as to what the term probability means. In my mind, it means more likely than not. Is it more likely than not that the defendant will commit criminal acts of violence that will constitute a continuing threat to society.

Criminal acts of violence, obviously, cover a myriad of fact situations from the minimum of a Class C assault, where someone touch [sic] you on the shoulder and you find that offensive – that is a Class C assault – to the other extreme of capital murder, and all the crimes that fall [p. 1636] in between, rape, robbery, kidnapping, assault, crimes against property. Someone takes their Harley-Davidson on the front lawn of Cy-Fair High School and does doughnuts on the front lawn, that is an act of criminal violence. The act of criminal mischief, and in viewing the defendant, do you feel that he probably will commit these acts of violence to the extent that he will be an ongoing or continuing threat to society. Once again,

the State must prove this to you beyond a reasonable doubt.

Obviously, there is testimony that might be proper or relevant that you might hear on the punishment phase of the trial that will assist you in answering this issue. You will be entitled to hear about past criminal record, if the defendant had on [sic]. You would be entitled to hear about criminal offenses he may have committed. You will be entitled to hear reputation testimony from people who know him as to his being a peaceful and law-abiding person or not being a peaceful and law-abiding person.

On the contrary, you may infer from the silence of the Assistant District Attorney [p. 1637] with regard to the defendant having no criminal record and not have any extraneous offenses or bad reputation witnesses, that the defendant would be a person who would not likely commit these acts of violence in the future. Once again, we are seeking to find twelve people who have an open mind as to the answering of these special issues. Is there anything about the discussion up to this point, Mr. Arney, that presents any difficulty for you?

A. No, sir.

Q. As I said previously, there are a minimum of two special issues that are presented on the punishment phase of the trial. There is a possibility that a third special issue will be presented to you if it is raised by the evidence. The first two are always presented and possibly a third, if it is raised by the evidence. We are going to say when something is raised by the evidence, it's not required an ongoing group of witnesses to testify that something took place. There is – if there is one line of testimony from one

witness as to this issue being raised, our law requires that I present this issue to the jury. All of these issues [p. 1638] are creatures of legislative intent, creatures of legislative intent. Our legislature has said these are the proper factors for the jury to consider in determining whether or not the defendant should live or die.

The third special issue calls upon the jury to evaluate actions taken by the defendant and the deceased before the deceased was killed, to view the total confrontation between the two people and then to evaluate their actions. This is not meant to be an act or special issue in which you reflect upon whether or not the defendant exercised self-defense in shooting the deceased. A person who has been convicted of capital murder cannot claim self-defense. A person walks in the store and shoots the clerk and kills him after the clerk has pulled a pistol and fired first, the defendant cannot claim self-defense because he has provoked the difficulty by walking in the store and attempting to rob the clerk. However, if the clerk in some way provoked the difficulty by his actions and his actions contributed to the total situation that resulted in his death, then you, as a juror, would be called upon to review these [p. 1639] actions and to decide whether or not the defendant was reasonable or unreasonable in taking the clerks life. This is a difficult issue to comprehend because I have the difficulty in my mind in the fact situation to the extent that the taking of another person's life is reasonable. However, this special issue, once again, is a road sign that the legislature has given the jury to stop and think whether or not they are making an appropriate punishment, recommending in taking the life of the defendant by voting for capital punishment or

do they think that life imprisonment would be more proper. But we are saying compare the actions of the defendant against whatever provocation, if any, that the deceased may have done that contributed to the total situation, and then, apart from the death of the deceased, determine whether or not the defendant was reasonable or unreasonable in taking the deceased's life.

Once again, let me give you a couple of examples to show you there may be varying fact situations that might cause you to answer this issue differently.

Assume you have the same young man who [p. 1640] goes into the store with the same old pistol with the same old one bullet in the chamber. He has taken money from the clerk, and he is as scared as he can be, still not intending to hurt anybody. He has turned to leave the store with the money, and he is putting his pistol in his belt, and he is one foot from the door. No one has been harmed in any way. As he puts his hand on the doorknob to leave, the store clerk pulls a pistol from under the counter and shoots and strikes him in the shoulder and leg and he falls to the floor, and as he is laying there wounded on the floor, the clerk runs toward him with the pistol and the hammer is pulled back and the clerk has aimed it at him, and he can see that the clerk is going to kill him as he lies there, and out of an act of self-preservation, he pulls the pistol from his belt and shoots and fires at the clerk and the clerk dies. In viewing that situation, the defendant is guilty of capital murder. The best he can receive is life in the penitentiary.

A Uh-huh (Yes).

Q But in viewing that situation, you can see that had the clerk not pulled the pistol from under [p. 1641] the counter, not pursued the defendant and fired at the defendant, he very likely would not have lost his life. He would have lost money but not his life, and in viewing the actions of the clerk, you possibly could say, "Well, the clerk did provoke the situation, and I do not find that the defendant was unreasonable in taking his life in light of what the clerk did."

On the contrary, you might have a cold-blooded killing situation where the clerk stands there defenseless with his arms raised and he is gunned down in cold blood. You may say in that situation that, "Yes, the defendant did act unreasonably in taking the life of the deceased." Again, there are different situations that dictate different answers, and the underlying thought or requ[illegible] that I have is that you keep an open mind on all of thse[sic] special issues until the testimony is completed and then formulate your decision. Do you feel you could have an open mind as to these issues?

A Yes, sir.

Q Is there any question you have with regard to what I have talked about up to this point?

[p. 1642] A No, sir.

Q I think this pretty much completes what I wanted to talk to you about. Mr. Hobbs, the Assistant District Attorney, will speak with you first, and then Mr. Mock, on behalf of the defendant, Gary Graham, will speak to you.

Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor.

Good morning, Mr. Arney. In your teaching of history and English, that is on a high school level?

A No, I'm in junior high.

Q Junior high school?

A Junior high school.

Q In the junior high there, what grades are included?

A Eighth grade. I teach eighth grade.

Q In looking at – when you say petty theft and car stolen, are those two separate instances?

A Yes.

Q In the instance where your car was stolen, was [p. 1643] it ever recovered?

A Yes, it was.

Q In looking at your jury service on the criminal cases, you have served in a robbery case and kidnapping case, is that correct?

A That case was the same thing. That was one occurrence.

Q Okay. Was the jury able to reach a decision in that case?

A Yes, it did.

Q Anything about your service as a juror that caused you any problem?

A No, sir.

Q I see that your wife is an executive. What type of operation is the company that she works for?

A They insure oil wells and lot of international insurance.

Q Oh. In looking at the aspect of robbery, do you remember the elements that robbery consist of in the State of Texas or would you like a little review?

A I really do not remember the details of it.

Q Robbery is defined in the Penal Code as the person commits the offense if, in the course of [p. 1644] committing theft and with the intent to obtain and maintain control of the property, a person intentionally, knowingly, or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death and if they cause serious bodily injury, it becomes aggravated robbery or using a deadly weapon in the threat without causing bodily injury, it becomes aggravated robbery. We will be using – I ask because it is an element in our offense.

You are an acquaintance with police officers and officers in law enforcement. In any way, would that prejudice you one way or the other?

A No.

Q Okay, and you have been teaching – for the last twelve years, is that correct?

A Yes, sir.

Q Where did you teach in Houston?

A Tyler Junior High School, Pershing Junior High School, Black Junior High School, and Clifton Middle School.

Q And since you deal with individuals that are young in your teaching, you understand the law of the [p. 1645] State of Texas, I'm sure you are well aware of when an individual, when he reaches the age of seventeen, he is an adult for all purposes of the law and the punishments thereon. Does the fact the youth of an individual, would that cause you, if you believed beyond a reasonable doubt, to treat that individual differently, say, a young individual than one that is thirty-five, forty, or sixty?

A I don't think so.

Q Okay. Now, what must the State prove beyond a reasonable doubt? Well, beyond a reasonable doubt, needless to say, is not beyond all doubt or beyond a shadow of a doubt. If it was beyond all doubt, you would have to have been present and seen what happened, and if that were the case, you would be a witness and not a potential juror.

The elements of the offense, needless to say, are important, and I would like to go over them with you. We have to prove beyond a reasonable doubt these things and only these things: that is was the defendant, Gary Graham; that it occurred in Harris County, Texas; that it was on or about May 13th, 1981; that while [p. 1646] in the course of committing or attempting to commit the

robbery of Bobby Grant Lambert, the conjunction and is there, but in the charge, it will be either one – intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Murder plus robbery. Do you have any questions on that, sir?

A No.

Q Okay. Now, I would like to give you a hypothetical situation that will be the basis of my next question for you and also will be the basis for discussion of these three special issues that occur in the punishment phase to be reached.

In the commission of robbery – before I get into it – in the course of committing theft if you'll look at the board there, sir, means conduct that occurs in an attempt to commit, during the commission of, or in the immediate flight after the commission of theft. In essence, robbery by its very definition can occur as an offense without any property being taken whatsoever. Do you have any problem with that?

A No.

[p. 1647] Q If I walk up to you and grab a pen out of your pocket and knock you down, I have committed robbery. If I pull a gun and demand your wallet and a police officer comes up behind me and say, "Drop it," I have committed aggravated robbery. Say in the instance I grab your pen, turn around, didn't say anything, walk away, and you came up and touched me on the shoulder and I turn around and knock you down, I have committed robbery by force and the bodily injury. No problem?

A No.

Q The fact situation I would like to give you is this: Let us assume that this courtroom is a Seven-Eleven store. Let us further assume there are four people present, that Mr. Arte, the legal intern, is here in an area of the store such as this with an obstruction from the rest of the store such as this banister. Further, that Mr. Mock is where you are, and from where you are now, you have a little bit of trouble, I think, seeking Mr. Pollinger on the other side here.

A Yes.

Q There is an obstruction of a degree as to your [p. 1648] view of Mr. Pollinger?

A Yes.

Q Let us further say Mr. Pollinger is also there, and he is operating the store and he is the clerk behind the register. And, further, as the fourth individual is that Mr. Thornton is present inside of the courtroom, inside of the store also in an area such as he is here, where he can see both Mr. Mock where he is at, Mr. Arte here, and Mr. Pollinger where he is at. Let us further presume that this is toward the end of the shift that he is working on in the store and that he has closed out his register for his shift and taken out the money that will be dropped. He has placed it inside of a commercial drop bag, a zip-up bag, and stuck it into his coat pocket that he is wearing and part of it sticks out above so you can tell it is a money bag and has something in it. Further, let's presume that while he is waiting for his replacement to come in, he is holding a box and stocking the shelf in back of the counter, in back of the register, and that I am going to be the perpetrator of the crime. I come in and I approach Mr.

Pollinger. I see the money bag [p. 1649] protruding from his pocket, and I move forward to take it from him when I get there, and I touch him and Mr. Pollinger still holding the box turns away from me to get away from my grip. When he does that, I pull a weapon and I start up with the weapon. Okay?

A Yes.

Q Mr. Mock, who is in the position you are, might hear some commotion, but he can't see what is happening over there. Mr. Arte has glanced over in that area, and the first thing he sees and the first thing that draws his attention and he concentrates on is that pistol that I have got. He hits the floor and it's probably out there. He is not watching me, nothing else, and he is just making love to the floor. Now, Mr. Thornton is – sees me pull the pistol on Mr. Pollinger as I am coming up with it, and he hollers at me, and when he hollers at me, I turn and look at him, and then I turn back from him and by this time. Mr. Pollinger has backed away from me. He has got loose from my grip I had on him and he is backing away a few feet. I turn and shoot him in the chest and kill him. Then, I run and leave. Let us further [p. 1650] presume and make it a little bit more difficult, and let's say when I am apprehended that the weapon that I used is not recovered, that while I was in the store that I didn't leave any prints that anybody could get if I touched anything, and that if I took any property, if any, I didn't – they didn't find anything on me. So I'm charged now with capital murder and I'm, being tried for capital murder, murder during the course of committing a robbery. You are one of the twelve jurors, one in the jury box. Let us further presume that you believed in your mind the State had

proved beyond a reasonable doubt first that the offense occurred in Harris County, Texas; that it was on or about a specific date; that the death of Mr. Pollinger occurred by shooting him with a gun; that it occurred during the commission of or attempt to commit the offense of robbery. The only element remaining is am I the one that committed the offense. Identity. Let us presume from the fact situation there, Mr. Arte has been on the floor and didn't see me. Mr. Mock was where you are and didn't see me. Mr. Pollinger is dead. Mr. Thornton is called to the stand, [p. 1651] and he testifies. He testifies to the fact that I saw Carl Hobbs, the defendant, shoot and kill Mr. Pollinger on the date in question. If you believe that beyond a reasonable doubt – I'm saying if you believe that beyond a reasonable doubt, could you, having believed that the other elements had been proved beyond a reasonable doubt base a conviction for the offense of capital murder upon the testimony of a single eyewitness?

A Yes.

Q Okay. Now, regardless of the age of that individual, my age, whether I was eighteen or forty-five or sixty?

A Yes.

Q Now, let us presume for the fact situation now that I have been found guilty of capital murder.

Now, we are going into the issue – to the special issues, and we are going to use the example for helping out. Needless to say, by its mere definition or its – or the thrust of special issue No. 1, you have to look at the conduct of the defendant of the offense of which I have

been found guilty to determine whether I committed the act deliberately and [p. 1652] with a reasonable expectation that the death of the deceased would occur. Does that cause you any problem, sir?

A No.

Q Now, deliberately will not be defined by the Court, as the judge told you. Webster defines it as willfully or voluntarily. Does an immediate definition come to your mind outside of those?

A No.

Q Okay. Now, deliberately, I think we would agree just by definition doesn't mean to be premeditated, that one can do a deliberate act without much thought. If I walked over to the cooler and knocked off these paper towels, that's a deliberate act. The question of the reasonable expectation that the death of the deceased would occur. Well, depending on the fact situation, you would have to look at that and make a judgment, once again, based on your common sense, what the burden of proof for the State to prove to you beyond a reasonable doubt based upon the evidence that it was a reasonable expectation that the death would occur, and it was a deliberate act.

In the fact situation that I have [p. 1653] given in the example there on whether or not one might look to the area of – where I shot the deceased. If I shot him in the foot, that might be something else. If I shot him in the chest or the head or the temple area, that might increase your opinion of whether or not it was a reasonable expectation that the individual would die.

Let me give you another fact situation. Maybe it's to the extreme, one way or the other, that, say, I walked in and I'm going to rob Ms. Slessinger. She is in the store, and I don't think there is anybody else there in the store I walk up to her and pull a gun and demand the money from the register. She is not moving as quickly as I think she ought to, and I'm going to speed her up, so I take the gun, point it to the floor, and intentionally pull the trigger. That's a deliberate act. I fire a shot into the floor, which ricochets off to the side, goes through a rack and hits and kills Ms. Hamilton, who is on the other side of the rack of the potato chip area. Do you understand that under the law, I have committed – in the course of committing robbery, I have done a [p. 1654] deliberate act that caused the death of the individual, an intentional act? I'm guilty of capital murder. You would have to ask yourself whether or not that was a reasonable expectation that the death of the individual would occur. I think that one in looking at your common sense and your viewpoints on that is whether or not my – the mere fact I took a weapon in the first place might be a factor that I might have to use it or maybe not in the example that the judge gave you, but there is just no set pattern.

Moving to the Special Issue No. 2. There I think you come into an area where there is the question of probability. The judge gave you his definition, but he will not give you a legal set definition. You will have to use your own. Does one immediately come to mind for you, sir, when you talk about probability?

A Yes.

Q What is that, sir?

A Probability would mean there would be a reasonable chance this might occur somewhere along the line.

Q Now, as to that issue, I think that you might [p. 1655] agree with me, sir, that the facts of the case which you have just heard and passed judgment on the guilt stage could give you some insight as to this individual's propensity one way or the other. Regarding Special Issue No. 2, the Court may allow evidence that it deems proper and pertinent to be admitted during this stage of the trial that you didn't hear in the first stage. If there is any, such as a prior criminal record, if any, other acts of criminal violence, if any, reputation, good, bad, or indifferent, maybe not, but other evidence that would aid you in determining if there is that probability to make your judgment beyond a reasonable doubt.

Criminal acts of violence – I think the judge went over it quite well with you. Do you have any questions concerning that?

A No.

Q The aspect of society in a broad sense that the judge used is also, would you agree, that the individuals that are confined as either prisoners or the guards or the officials of a prison system are also part of our society, and I would submit that this question also goes to that issue. [p. 1656] Would the individual be a threat to those people? Possibly. Do you have a problem with that concept?

A No.

Q Okay. Always, as to any capital murder case, as the judge told you, those first two special issues will

always be presented and that the State's burden is to prove that the answers should be yes to those beyond a reasonable doubt. Now, let us assume that we are at this phase of the trial and only those two issues have been presented, and, further, that you believe beyond a reasonable doubt in your own mind that those – that the answers should, in fact, be yes beyond a reasonable doubt in your mind. Could you, knowing that yes answers – and the other eleven members, it would have to be a unanimous verdict – that those answers would result in the Court, by law, be assessing the death penalty – could you, knowing that is the result, answer yes if it was a proper answer?

A Yes.

Q Now, as to Special Issue No. 3, it is a difficult – it's more difficult. Maybe it poses some [p. 1657] problem, but I think by breaking it down, I would think that one wouldn't have too much problem. I would say we are going to look at unreasonableness and provocation and the actions of the two people, the person that was killed and the person that did the killing. I think if raised by the evidence is the key phrase there. If it is just the minute type of – no matter how farfetched it might be – it has got to go under the law.

The question that you have is provocation, if any, looking at the actions of Mr. Pollinger in my example – what he did. When you look at what he did, you have to decide was it, in fact, provocation. If it wasn't provocation, then my killing him was unreasonable. If you decide in your mind there was provocation, then the question becomes was it reasonable or unreasonable. If it was

unreasonable, the answer should be yes and death would result – and if the answers to 1, 2, 3, are yes, it's death. If it's no – you might answer that one way or the other.

Let me give you an extreme. Remember the judge's example about the guy going out the [p. 1658] door after he was shot twice and the individual coming back up?

A Yes.

Q You may or may not say that was provocation depending on the fact situation and what happened immediately preceding that caused the death of the deceased. Do you have any problem with that concept, sir?

A No.

Q So, using just good common sense in looking at those special issues and you would apply the same burden of proof, beyond a reasonable doubt, that you exercised even though this is a capital murder case, that you exercised as a juror on those other cases? Could you not do that, sir?

A Yes.

Q Are there any questions, sir, that you feel that you would like to ask me or something that I might have confused you with that you would like clarification on?

A No.

MR. HOBBS: Thank you very much. Pass.

THE COURT: Mr. Mock, you may proceed.

[p. 1659] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q Mr. Arney, the last question Mr. Hobbs asked you, would you use the same judgment you used on the prior cases that you served on in this case does not mean, sir, that you would automatically feel some kindred spirit to one side or the other, does it, sir?

A No.

Q You would still require the State to assume its burden and prove to you beyond a reasonable doubt that Gary Graham was guilty of the offense of capital murder before you could find him guilty of capital murder?

A Absolutely.

Q Also, sir, that as he sits here, he is presumed to be innocent until the State meets its burden of proving guilt beyond a reasonable doubt. Could you give him that presumption of innocence?

A Yes, sir.

Q You don't think he must be guilty of something or the great State of Texas would not bring him to trial if he had not done something?

A No, sir.

[p. 1660] Q Okay. I see you have a fourteen-year-old child. Is it a boy or a girl?

A A little girl, not little, but a girl.

Q What school does she go to?

A Jersey Village High School.

Q What grade is she in?

A Ninth.

Q Is she driving you crazy?

A I'm getting to that point.

Q I have one that is fourteen. I don't know if she is going to lose or I'm going to lose. Mr. Arney, also in these kind of cases, this is the only type of offense for which one cannot waive or give up his or her right to a jury trial to assess punishment if found guilty. The Code of Criminal Procedure mandates that prior to the selection of a jury, we voir dire jurors individually, and during that voir dire, we talk to them about various things that might occur. One of those things which might occur but not as a certainty would be the finding of guilt. Do you understand if there is not a finding of guilt, we do not get to the punishment stage at all?

A Yes.

[p. 1661] Q And because we are talking to you about punishment at this time, we are in no way anticipating a finding of guilt.

A Yes, sir.

Q So you would not hold it against us that we are talking punishment to you before you have even heard the facts of the case, would you?

A No, sir.

Q Okay, would you share with me, Mr. Arney, in your own words, your feeling about the death penalty as

an assessment of punishment in general? I don't want to dissertate you. I want to know how you feel.

A I have thought about it a great deal, much prior to this. What I feel is it is necessary but only in extreme cases.

Q Okay, but you have come to grips with that inside yourself that if a person would be found guilty beyond a reasonable doubt, that would not automatically necessarily mean that they would be assessed or should be assessed the death penalty?

A I beg your pardon?

Q Just because a person has been found guilty of the offense of capital murder, you do not [p. 1662] feel that they should automatically get the death penalty?

A No.

Q Okay. But, converse to that, if the State meets its burden and proves to you beyond a reasonable doubt all those special issues should be answered yes, knowing that the end result would be death, could you divorce yourself from any emotions you might have from making a decision in answering those questions?

A Yes, I think so.

Q Okay. Special Issue No. 1 is a two-phrased sentence. The first goes to deliberately. A person doing something deliberately. First off, you've got to find that person did what they did deliberately. Do you have any problems with that?

A No.

Q The second part you would have to analyze as to whether the person had a reasonable expectation that the death would occur regardless of the deceased or any other person. Would you have any problems, sir, breaking those two down separately and analyzing them separately before you came to a conclusive answer, yes or no, to [p. 1663] the total Issue No. 1?

A No.

Q Okay. Can you see, sir, in your mind a set of circumstances where one would possibly shoot somebody and not have the expectation that that person would die?

A Yes.

Q Do you think, sir, that a person – if a person has a weapon and commits an offense, he automatically intended to use that weapon in the commission of the offense?

A No.

Q Now, the State in answering – in asking you Issue No. 1 or presenting evidence, if they chose to do so on Issue No. 1, is not required to show you a motive or why somebody did something. Would you automatically vote yes to Special Issue No. 1 because you don't know why someone did anything?

A No.

Q Special Issue No. 2, sir, goes to probability that one would tend to commit violent criminal acts and would therefore become a continuing threat to society. What kind of information, sir, if they were available to

you, would you [p. 1664] like to have to assist you in making that determination?

A Background, previous acts, things that had happened prior to this.

Q Would it be a fair statement, sir, to say you would like to have as much overall information as you could possibly have in determining your answer?

A Yes, Sir.

Q Special Issue No. 3, sir, goes to the reasonableness or unreasonableness of the defendant in killing somebody. The burden of proof as to the conduct being unreasonable is still on the State. Would you, sir, shift the burden to the defendant to make him show you anything, knowing he doesn't have to testify? We don't have to do anything? Would you shift that burden to the defendant to make him show you what he did was reasonable as opposed to the State showing you that it was unreasonable?

A No.

Q Okay. What, sir, does provocation mean to you?

A Being driven to respond to something.

Q Would you say, sir, that provocation could be not only actions but words?

[p. 1665] A Certainly.

Q How do you define reasonable?

A That is a good question.

Q And, again, as Mr. Hobbs and the judge have told you, there are no right or wrong answers. What we are trying to do is get to know you in a short period.

A Reasonable, within what is normal behavior within the confines of society.

Q Okay. That is very fair. As it relates to Special Issue No. 3, sir, I think you must understand by now that we are not talking about self-defense.

A Yes, sir.

Q It is confusing even – well, even to me because I'm no great brilliant legal scholar, but it is confusing to me as a person that has to deal with it on an ongoing basis because it is actually – if it weren't for the other elements, it would be basically a self-defense issue, but it goes to, I would imagine, mitigation would be a better word as opposed to justification. Do you have any problems with that?

A No, sir.

[p. 1666] Q Can you see, sir, a person in his own place of business, somewhere he has a right to be doing what he has a right to be doing, someone comes in and tries to rob him, his feeling is that I'm protecting my property. I have worked hard for my property, and I'm not going to give it up freely and voluntarily just because someone comes in with a gun and demands my property. So in an effort to protect his property, as he has every right to do, he makes a move. When he makes that move, we don't know what he is moving for because as he makes the move, he is killed. He is shot. The person there robbing him sees him make the move and in reaction to

that move, he shoots him. Could you, sir, conceive in your mind a set of circumstances, and I am not asking you to give me a fact situation, but conceive in your mind a set of circumstances where the act done by the defendant in response to whatever provocation might have occurred would have been reasonable in light of that provocation?

A Yes.

Q Sir, are there – is there – you teach English, don't you?

[p. 1667] A Yes,

Q Is there any reason whatsoever that you might feel that you could not be a fair and impartial juror in sitting and listening to the facts of this case in determining guilt or innocence or punishment?

MR. MOCK: That would be all, Your Honor.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the Defense?

MR. MOCK: We will accept.

THE COURT: Mr. Arney, will you stand and raise your right hand and be sworn as a juror, please?

(At this time, juror sworn.)

THE COURT: Mr. Arney, this will conclude your service for today. We anticipate that we will complete jury selection by the end of the week and we will begin testimony on Monday, the 26th, we think. We do

not envision the trial taking more than one week to try. The trial will be tried in the courtroom which is on the fourth floor of this building. [p. 1668] We have phone numbers we can reach you at as to your home phone number. Does the school have a number that you can be reached at?

A It's Arnold Junior High School. Arnold Junior High School at Cypress-Fairbanks.

THE COURT: Mr. Pollinger will give you a call on Thursday or Friday to let you know if we will begin on Monday, the 26th. With that, you are excused. I don't anticipate there being anything in the paper about the facts in which case. If there happens to be something, don't read it or watch TV. Thank you very much, Mr. Arney. If you need anything to show you have been here, my clerk, Ms. Hamilton, will give you that. With that, you are excused.

[p. 2191] MS. MARY ANN GAYLORD, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Good afternoon, Ms. Gaylord. Are you a friend of Sherwood Stewart that plays tennis out at Dewes Creek?

A No.

Q Let me spend a little time going over your personal data form. You said that you or a member of your family has been a witness in a criminal case, is that true, ma'am?

A My brother, is that family?

Q Yes, ma'am.

A He is – he worked for the Government and he does a lot of testifying in cases dealing with fraud.

Q Okay.

A I didn't – the girl told me I needed to write yes and I could explain.

Q You or none of your family have been a victim?

A No.

Q I noticed that you have an 18 year old child, is that a son or a daughter?

[p. 2192] A It is a stepson.

Q The defendant in this case, Gary Graham, is 17 years old. He is accused, obviously, from what I told you

before, of the most serious crime that we have which is the offense of capital murder, and I would instruct you, as I did before lunch, that if you serve as a juror in this case and at the close of the testimony you are convinced beyond a reasonable doubt that he is guilty of the crime that he is accused of committing, then out [sic] law would say that you must vote in accord answers with your belief and find the defendant guilty of the crime that he is accused of committing. Obviously, if you do that, as I have told you before lunch, that if he is found guilty of the offense of capital murder, the jury has only two alternatives for punishment that can be assessed by the jury and that is life in the penitentiary or death by lethal injection. As I told you, the State has the burden of proof beyond a reasonable doubt, and as I further said it does not have to prove its case beyond a shadow of a doubt or beyond all [p. 2193] doubt.

So obviously, everyone is concerned about the jurors being able to follow the law as it is.

Let me ask you this. You have an 18 year old stepson. The defendant is 17 years of age. Do you think that the fact of the age of the defendant might influence your verdict one way or the other?

A No, I feel like it would be the act, the evidence.

Q I also told you and we have talked about it just now that because of the fact that the defendant is accused of the offense of capital murder, if he is convicted and those are the only two alternatives for punishment, do you have an opinion with regard to the question I voiced before lunch with regard to the issue of capital punishment? Do you have an opinion one way or the other,

either for or against capital punishment, you don't have to tell me what it is, but do you have an opinion?

A Yes.

Q Do you have any conscientious, religious or [p. 2194] moral scruples against the imposition of the death penalty in a case that you would consider to be a proper one?

A No.

Q I take it, then, what you are telling me, ma'am, then, is if you felt it were a proper case for the imposition of the death penalty, you could participate in a verdict in which the death penalty was returned, is that right?

A Yes.

Q As I also told you before lunch, the jury in a capital murder case does not communicate its verdict to the Court by signing a blank piece of paper and sliding it out to the Judge writing life or death on the paper.

The jury answers special issues that are submitted in a Court's charge, and the issues require an answer of either yes or no.

It is the way these issues are answered that determine what the defendant's punishment will be.

If the jury answers all of the issues yes, the defendant will receive death by lethal injection. If the jury answers one or more of the issues no, the defendant will [p. 2195] receive life in the Texas Department of Corrections. This is, once again, assuming that he is found guilty of the offense of capital murder.

A Right.

Q We are seeking 12 people that have an open mind and can only reach their decision after all the evidence is presented and after which they have determine [sic] whether or not it is an appropriate case for the death penalty. Do you feel that you could do that, Ms. Gaylord?

A Yes.

Q Okay, a couple of more notes of discussion about the punishment phase. A yes answer to any of the issues or all of the issues requires a unanimous agreement among all 12 of the jurors. On the punishment phase, all 12 must agree that the issues should be answered yes. If the issues are answered yes completely across the board, the defendant receives the death penalty.

A no answer, on the other hand, requires a vote of 10 or more. If 10 or more of the jurors feel that the no answer is appropriate, that is sufficient to sign the [p. 2196] verdict form as to that particular special issue and the result would be that the defendant receives life in the Texas Department of Corrections.

The State of Texas has the burden of proof on the punishment phase as it did on the guilt or innocence phase. The State must prove to you beyond a reasonable doubt that the defendant should receive the death penalty.

By the way you answer these special issues, the jury answers the issue and communicates their wishes to the Court, and then I, as the presiding Judge, assesses the punishment in an agreement with the manner in which

the issues are answered by the jury. I do not have the discretion to change anything.

There are a minimum of two special issues and a maximum of three that are submitted in the charge. There are no legal definitions that will be included in the charge on the punishment phase as to the meaning of any of the terms included in the special issues. It is a matter of common knowledge and common interpretation of the jurors.

[p. 2197] However, I will discuss all of the issues with you to give you a preview as to what these issues are and try to give some explanation or discussion with you so that you will not be unfamiliar with them if you do serve as a juror and do reach the punishment phase of the trial.

If you would turn to your right and look at the first two issues that are attached to the bulletin board.

A Yes, sir.

Q The first two on the right. Read those two and then we will talk about them.

A Yes.

Q Have you had a chance to read those first two issues, Ms. Gaylord?

A Yes.

Q Now, once again, assume we are on the punishment phase, assume you have found the defendant guilty, hypotehetically [sic] speaking, you have found this person guilty of taking the life of another human being while he was in the course of committing another felony

offense, and you have heard testimony on the guilt phase of the trial which pertains to the [p. 2198] defendant taking the life of the deceased, in the testimony surrounding the taking of this person's life.

Now, when you get to the first special issue, on the punishment phase, we are asking you two questions. We are asking you to review the conduct in which you were informed about the defendant's taking the life of the deceased and we are asking you whether the conduct of the defendant that resulted or that caused the death of the deceased was committed deliberately, number one and was there a reasonable expectation that the death of the deceased or another person would occur. So those are the two.

A That is at the initial time of the crime, right?

Q This is the facts surrounding the killing. Generally speaking, there is a minimal, if any, further testimony presented on the punishment phase with regard to the facts surrounding the crime.

Generally, you have already heard that on the guilt phase of the trial. Okay, but we are asking you to think back to the [p. 2199] testimony that you have heard about the taking of the individual's life by the defendant. We are asking you two things.

Number one, when he embarked upon this conduct that resulted in the taking of the life, did he do it deliberately and number two, did he reasonably expect that he would be taking the life of the deceased?

Let me give you a couple of examples. Assume that there is a young man in Baytown, who has a wife and family that are at home and are very sick.

He has lost his job. He can't get a job anywhere. He has tried. His unemployment benefits have been exhausted, and he has no other way he is going to get anything, and he is fit to be tied about the concern of his family.

Out of frustration, he takes the pistol he had with the one bullet and he goes to a Stop-N-Go. He walks in the store, intending to take money from the clerk, but not intending for anybody to be hurt or harmed. As he walks in the door, he slips on a wet piece of pavement where someone has [p. 2200] spilled a coke on the floor, and his feel [sic] fly out from under him. He hits the ground and the gun has flown from his hand and the gun hits the floor and discharges and the clerk is killed. The clerk is behind the counter.

In viewing that situation, you might say that the defendant went in there deliberately, intending to commit the robbery or take money.

However, the question is did he reasonably expect that the clerk's life would be taken. In that situation, you might very well answer it no he did not reasonably expect to take the clerk's life, and another situation might be one where he goes in and takes the money from the clerk, and as he starts to run from the store, the clerk starts chasing him.

He turns around and fires at the clerk's foot to stop him and shoots the clerk in the foot, and falls and hits his head on the counter and he dies from the blow.

Once again, that person could once again be charged with capital murder, but the question becomes did he reasonably expect to take the life of the person when he shot him [p. 2201] in the foot. Once again, you might say no to that situation.

And I want to reurge for your situation the fact that the State must prove to you beyond a reasonable doubt that it should be answered yes. So if you have a reasonable doubt, then, my charge to you would say you should answer it no. Do you understand that?

A Yes.

Q In contrast to these two situations would be one where a person walks into a store and takes money from the clerk and guns him down in cold blood, cold blooded killing.

Obviously, in that situation, you very well might answer that yes, but the point I am trying to emphacize [sic] is that we must have 12 people who have open minds and won't answer this issue until all the evidence is presented.

The second special issue is calling upon you to make a prediction in the future.

Once again, the same burden of proof applies. However, the State must prove to you that there is a probability that the defendant will commit criminal acts of violence in the future that will constitute a [p. 2202] continuing threat to society. There will be no definition as

to probability. That can be viewed in different ways. My interpretation of probability is that it probably will occur, that it is more likely than not, not that it is a certainty, but it is more likely than not to happen.

And the issue is will the defendant more likely than not commit criminal acts of violence which include many, many things, from a minimal class C offense of assault where someone may pull your glasses from your face and touch the side of your head, if you find that offensive, that person is guilty of a Class C assault, to the other extreme, which is capital murder. Many crimes are included in between, robbery, rape, kidnapping, crimes of violence against your property.

In the last phrase in this issue is will this person be a continuing threat or ongoing threat to society. Society not only as you may know it and those folks that walk the streets of Baytown, but also the society that may exist within the Department of Corrections of Texas, and the guards there. [p. 2203] There are many things you can consider in answering the second special issue.

A Yes, sir.

Q You may consider the prior criminal record of the defendant, if he has any. You can consider other criminal offenses he may have committed, if any. You can consider what others who know him say about him, and you can consider the facts of the crime that you found him guilty of committing; and armed with all this, you may answer it yes or if there is an absence of any of these things, you may answer it no, that it hasn't been proven to you beyond a reasonable doubt that element.

Do you have any problems with those two issues?

A No.

Q There is a probability that a third issue will be presented. This, to me, is a more difficult issue to understand, however, it has the same importance as either of the first two.

If a no answer is presented to this issue as with the other two, the defendant will receive life in the Texas Department of [p. 2204] Corrections. If a yes answer is given in conjunction with the two yes answers to the first two issues, the death penalty will result, and in this issue, the third issue is only presented if it is raised by the evidence. If there is one line of testimony from one witness that raises this isuue, [sic] then I must, as a matter of law, present this issue in the Court's charge on the punishment phase of the trial. If you would take a moment to review the third issue, Ms. Gaylord, and then we will talk about it.

A Okay.

Q The third special issue is not a civil defense issue. We are in no way trying to present to the jury an issue of self defense, which might justify the taking of a deceased's life. That cannot be done. If a person is convicted of capital murder and the evidence supports the factual account that he provoked the situation in the first place, hypothetically speaking, by walking into the store with a drawn pistol and he shoots and kills the clerk after the clerk has tried to defend himself in some way, that defendant cannot claim self [p. 2205] defense. He can't claim that he killed the clerk in self defense. He very

conceivably would be guilty of capital murder, and would be faced with this issue which is the third issue in the punishment phase of the trial.

This issue is not an issue of justification. We are not saying that the taking of the clerk's life or the deceased's life was justifiable homicide. This is once again a creation by the legislature, which in my mind, is an issue of mitigation. It is a third stopping point that our legislature has deemed appropriate for jurors to stop and consider differing factors of the crime, itself, or the person's of the defendant and to determine whether or not it is appropriate that the defendant receive life or death.

We are in no way trying to infer that the deceased has done something wrong. We are not saying in this issue that it is wrong for a person to defend his property or himself or herself, the legislature has deemed it appropriate that if the deceased in some way has in his conduct contributed to or provoked the situation by some form of [p. 2206] provocation, then the jury must evaluate his conduct in light of the conduct of the deceased and make a determination whether or not the defendant was reasonable or unreasonable in his actions in taking the life of the deceased. It is difficult to understand, it is hard to think that a person would not be acting unreasonably in taking the life of another person. So this issue presents some difficulty.

However, the legislature is saying, jury, you must consider this when you are making a decision as to whether or not another human being will live or die.

Let me give you an example that may visualize this issue I am trying to explain to you.

Assume we have a young man again that has gone in the store, taken the money from the clerk, has not spoken loudly or harmed anyone or not struck anyone. He turns to leave, places the pistol in the belt of his trousers, walks all the way to the front door and reaches out when he is struck in the back by the bullets that are fired by the clerk and [p. 2207] falls to the floor. The clerk runs at him with a drawn pistol and the hammer held to the rear and the person knows if he doesn't do something he is going to be shot to death there on the floor, so he out of an act of self preservation, not self defense, but preservation, pulls his pistol out and fires and shoots the clerk and the clerk dies. In the eyes of our law, that person is guilty of the offense of capital murder. He can't claim self defense because he committed the robbery in the first place. The clerk was defending his property.

However, in that situation, you very well might say objectively that the clerk, had he not done anything, would not have been harmed in any way, but by pulling the pistol from under the counter and pursuing the robber there on the floor, contributed to the situation by pouring gasoline on the fire.

If the jury determines that to be provocation, what the deceased has done, it may be something less than that, but assuming that is our example, then the legislature has then demanded that the jury must evaluate [p. 2208] those actions in determining whether or not the defendant was reasonable or unreasonable in his actions in taking the life of the deceased. Once again, it is not justification. It was mitigation. they are saying if the deceased did something to provoke the situation, stop

and think, did the defendant act reasonably or unreasonably? Should the defendant live or die?

Do you see what I am driving at?

A Yes.

Q Do you have any problems understanding any of these issues?

A No.

Q Do you feel like you can have an open mind on all of these issues?

A Yes.

Q Okay, any questions about anything I have talked about?

A No.

Q I think that pretty much sums up everything I wanted to speak to you about. As I told you, Mr. Hobbs will have a chance to speak with you and Mr. Thornton on behalf of the defense will have a chance to speak with you. Mr.

* * *

[p. 2109] Hobbs?

MR. HOBBS: Thank you, Your Honor.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Hello, ma'am. I guess the first thing I need to ask you is your feelings about the death penalty. Do you have a position that you developed over a long period of time?

A Well, my feeling, I have had it for a long time.

Q And that is?

A That is that some cases I think the death penalty is warranted.

Q Okay, now, in discussing with the Judge, this concern in reference to ones age. This is a severe crime alleged. The punishment possibilities are the severest that exist. Age would not in and of itself be the controlling factor in your decision?

A No.

Q The burden of proof, does that give you any problem, beyond a reasonable doubt?

A No.

Q Not beyond all doubt, because if it was beyond [p. 2110] all doubt, that is an impossible burden. You would have to have been there and saw what happened and if that was the case, you would be a witness, and not a juror. Beyond a reasonable doubt, in that burden of proof does not require the State to show a motive. We don't have to show why he did what he did.

The defense doesn't have to do anything. Doesn't have to put witnesses on. The State can't call the defendant. They can just be there. So, in no essence, that would be an impossible task in most instances, do you agree?

A Yes.

Q Now, conflict. The mere fact we are in a courtroom shows that there is conflict. As a juror, your job would be to resolve that conflict, to decide what, in fact, did happen, and that would be the basic reason of your ruling.

Did the State prove its case to you to determine what the jury would believe?

The jury can believe all of what a witness says, part of what they say or absolutely nothing, and each witness that takes [p. 2111] that stand takes the same oath. Does that pose a problem?

A No.

Q Okay, now, I would like to give you an example that I would use in asking my next question, and then we will also use in discussions of the special issues that the Judge has gone over with you earlier.

Let us presume for the purposes of our example that this courtroom is a 7-Eleven store.

Furthermore, that there are four people present within the 7-Eleven store, that there is an individual occupying a position in the store similar to where – the position you are occupying in the courtroom here, that position being such that Mr. White, the bailiff here at the other end, on the other side of the Judge, you can't see

him from where you are now or if you do see him, you just see parts of him or the back of his head or something. Besides Mr. White and the person occupying the position you are in, you are not there, you are going to be a juror later on, let us say Mr. Mock is also present [p. 2112] and he is in an area of the store such as this jury box is with an obstruction such as this railing present also inside the store and that the fourth person present there in the store is Mr. Thornton, and that Mr. Thornton is in a position that he can see both Mr. White where he is at, Mr. Mock here and the person also occupying your slot.

Now, let us further presume that this is toward the end of the shift that Mr. White is on, Deputy White, and that he is a cashier supervisor during that shift, that he is closed out and that he has taken the money they don't need for the next shift out and placed it into a commercial bank bag and zipped it shut. He has placed that money bag in his coat pocket. Since it is a fairly good size, it protrudes out of his pocket, such that you can see it from the outside.

Let us further presume that as he is waiting for the next shift to come on that he is restocking the shelves in the back of the courtroom where the register is, and that he has got a box of items that he has taken from the box and places them on the shelf, and [p. 2113] I'm going to be the robber. I walk into the store and I see Mr. White placing the items in the shelf. I see the money bag and the money pouch and I approach and I reach to get it because I am going to take it. I'm not saying anything, and I, in my process of reaching and taking that, I'm starting to grab it and before I get there, Mr. White sees me and he

turns, still holding the box and turns away, so I can't grab it.

When he does that, I grab him with my hand, grab hold of him. I come up with a gun, and in the process, Mr. Mock, who is sitting over here, sees me in that location. He isn't paying much attention, but he sees me with that gun and he just concentrates on that gun. He sees the gun. He hits the floor. He couldn't identify me if his life depended on it. The person that is occupying the slot that you are at can't see clearly, if anything. Mr. Thornton is in a position that he sees me holding Mr. White there, that I have ahold of him and I have got the gun. As I am coming up with the gun he hollers at me, I turn with the gun and I look at him and I [p. 2114] look at him right in the face and when I am doing that, Mr. White breaks loose from my grasp and moves back just several feet. I turn, shoot, shoot him in the chest and kill him, and run out of the store. Any problem?

A I understand what you are saying.

Q In the example, I committed the offense of aggravated robbery, and in the process of comitting [sic] that robbery in the course of committing that robbery, I have caused the death of Mr. White.

So we have the offense of capital murder. Now, let us really get tough. Proof beyond a reasonable doubt is the burden that the State has in both phases of the trial.

Now, let's make it tough from the standpoint that when I am caught they don't find the gun that I used to kill Mr. White with. I didn't leave any fingerprints, and in that example I didn't take any property, but let's say if I

had taken property out of the store they didn't find it. They just got me.

Okay, I'm brought to trial and you are a juror now, and I am being tried for the [p. 2115] offense of capital murder, murder during the course of committing robbery or attempting to commit robbery. You hear the testimony and during the testimony you believe that the State has proved to you beyond a reasonable doubt that the offense occurred in Harris County, Texas; that it was on or about a specific date; that it was during the course of a commission of a robbery and that I intentionally caused the death of Mr. White by shooting Mr. White with a gun. The only thing that has not been proved and the only other element left in the offense is who did it. Okay, now, the individual that was in a position where you are now didn't identify me. Mr. Mock was down on the floor and was concentrating on the gun. Now, Mr. Thornton comes up and he testifies and he states, I saw Carl Hobbs sitting right here in that chair with his arm on the jury rail and he is the one that shot and killed Mr. White on the date in question.

My question to you is this: If you believe Mr. Thornton's testimony beyond a reasonable doubt, could you base, and this is [p. 2116] a general theory, could you base upon the testimony of a single witness, base a conviction as a juror for the offense of capital murder if you believed that eye witness beyond a reasonable doubt?

A Yes.

Q Now, in the example we used, let us proceed to the punishment phase. Now, based upon that, I have been found guilty of capital murder, now you, as a juror, with

the same burden of proof and it – there is still no change, it never shifts to the defense. The State has to prove it to you beyond a reasonable doubt.

Special issue number one comes into play, and from what your discussions with the Judge, needless to say, you have to look at the offense itself that you just had to determine by its very content, to answer that question.

Now, deliberately and there will be no definition as they are in the first phase. Does deliberately have an immediate definition that comes to mind for you, ma'am?

A Yes.

[p. 2117] Q Would you please share it with me?

A That would be, not considering anything around him. He just did it or they just did it.

Q Websters has defined it as being a willful or voluntary act?

A Willful.

Q Now, it doesn't mean a premeditated act. It doesn't mean an action, that is the opposite, it is definitely not an accident, and with a reasonable expectation that the death of the deceased or another would occur. Reasonable expectation, well, expectation is, once again, a process that you, as a juror, would have to go in. You might very well look at varying situations that the Judge gave you that presented different types of issues or as in the example that I posed here for you.

Let us go to another example possibly and in looking at these two issues.

It's – say I went up to Ms. Slessinger and she was behind the cash register and I say, I want all of your money and I want it now. I have a gun on her. She is taking the money out of the register, but she is not doing it as fast as I thought she [p. 2118] should be, so I'm going to speed her up. I am in the store by myself there and nobody is with me, and I can't see anybody else other than her, and I put the pistol down to my side and point it at the floor, pull the trigger, shoot, to let her know I mean what I said?

A Yes.

Q The gun goes off. The bullet hits the concrete floor and ricochets off to the side, goes through a counter and the gentleman who was on the other side of the counter shopping, the bullet goes in him and kills him. Now, looking at that situation, you can see that I, my actions, I have intentionally pulled the trigger that caused the shot to go and I was in the course of committing a robbery, and I caused the death of that individual. A deliberate act.

The act, itself. Now, the question becomes a reasonable expectation that the death of the deceased or another would have occurred because of that act. You may or may not see circumstances that would, in your mind, where you would be able to answer that yes or no. You know, not knowing the person

* * *

[p. 2219] was there, and then the other, without motive, you have to look at the fact situation. The mere fact that I

carried a weapon in with the intent to use it, the examples that the judge gave you, you can see there is a [sic] very many types of situations that can come into play.

Do you think you could be fair to both sides in looking at that?

A I believe I could.

Q A reasonable expectation that the death of the deceased would occur. You may ask and find yourself that if I came up and shot you in the foot, it could be a deliberate act and you may or may not believe that to be a reasonable expectation that one would die, but if I shot you in the chest, or in the head that may cause other things to come to mind.

Do you have a problem with that, ma'am?

A No.

Q If you believed beyond a reasonable doubt the appropriate answer to that should be yes, could you say yes?

A Yes.

Q Special issue number two, probability. Does [p. 2220] the definition for probability come to mind?

A Yes, it is possible.

Q Possible, likely?

A Could happen.

Q Okay, criminal acts of violence can be everything from minor assaults to aggravated assaults to rape, robbery, aggravated robbery, murder or capital murder, other types of offenses.

Now, as to this question of probability, I think that you can see that the actions, the offense, itself, would give you some insight as to that individual. You have been able to see how that person reacts in a given situation and under a given set of circumstances, to make some judgment. Do you agree with that?

A Yes.

Q The Judge, in his discretion, can allow other testimony in as to prior criminal record, if any, other acts of violence or reputation testimony. It could be good or bad.

A This is after the guilt phase?

Q Yes, ma'am.

Now, constitute a continuing threat [p. 2221] to society. That is by either his actions – in the evidence you look at. You can look at the evidence presented to you, if any, and make that judgment, could you not?

A Yes.

Q Now, society in a very broad term could even include those people in prison. Can you concede in your mind that an individual or if there are individuals in our society that could be constituted threats to other inmates or people that are there?

A Yes.

Q If you believed, beyond a reasonable doubt, that answer should be yes and you said yes, knowing that if these were the only two issues submitted because it is possible that those two yes answers would result in the death penalty, could you say yes, knowing that that would result?

A Yes.

Q Now, special issue number three, if raised by the evidence, becomes the key factor there, and I think you need to break this down because we are going to be looking at the actions of two separate people, the person [p. 2222] that was killed and the defendant. And provocation, if any.

The first thing you have to look at is you have to look at what the defendant, I mean the deceased did, that person that was killed. That could be many things, from the example that the Judge gave you, on one extreme to maybe doing absolutely nothing or maybe pulling away or hitting the individual. There is a whole lot of things that you could consider, right?

A Yes.

Q You have to look at that and decide in your mind was it provocation, first of all, first of all was there any, and if there was, is it provocation in your mind, if it was provocation, you still haven't answered the question. You have to look at the actions of the defendant in relation to that provocation, if any. If it was no provocation, then the killing by the defendant of the deceased would probably be unreasonable.

If it was provocation in you [sic] mind, then was the reaction or the killing, the conduct of the defendant unreasonable in [p. 2223] response to that provocation, if any, or those actions on the part of the individual being killed. Do you have a problem with that?

A No.

Q You can conceive of circumstances when, as the Judge said, it is not self defense, he is still guilty of the offense, it is whether or not in that particular situation and with that result, was it reasonable under the circumstances as they existed. Once again, you are going back to the fact situation that you looked at in the guilt stage of the trial. Any problem with that?

A No.

Q Is there any reason, ma'am, that you feel you couldn't be a fair and impartial juror in a case such as this?

A I believe I could be fair.

Q Thank you very much. I'll pass the juror.

THE COURT: Mr. Mock?

[p. 2224] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q May it please the Court, Ms. Gaylord, my name is Ron Mock. I would like to ask you a few questions. I assure you that they are not couched in any way to confuse you or trick you.

I would like for you, ma'am, if you would to share with me in your own words your feelings about the death penalty as a means of punishment?

A I feel like the death penalty is warranted in certain instances, depending on the type of death the deceased has received.

Q How long have you felt this way?

A A long time.

Q What grade do you teach, ma'am?

A I have taught 5th and 6th grade. I am presently librarian.

Q Would you, ma'am, be able to give Gary Graham the presumption of innocence that he is cloaked with as he sits here?

A Yes.

Q And until that presumption is rebutted by [p. 2223] [sic] credible evidence which shows you beyond a reasonable doubt that he is guilty of the offense, you could still give him that presumption of innocence, would you not?

A Yes.

Q And we are also discussing at this point punishment, and the Code of Criminal Procedure mandates how a criminal trial may proceed. It tells us also that in this kind of case and this is the only time it can happen where a defendant cannot give up his right to have a jury assess his punishment if he is found guilty.

A That is right.

Q As relates to the special issues, special issue number one, I am sure we all said and we are going to say it again is a two prong issue. It has an A and B part.

One, whether it was deliberate and two on the other hand, there was a reasonable expectation that a death may occur. Would you be able to separate them, ma'am

and analyze them individually before answering special issue number one?

A In other words, could I see if he had or if the [p. 2226] person when he went in with the intention of committing a robbery, if he had intended to commit a murder as well at the same time, is that what you are asking me?

Q No, well not really. I'm asking you to separate one.

A Repeat it.

Q Whether he caused the death deliberately?

A Okay.

Q And two, whether there was a reasonable expectation on the part of the person that did the killing, that somebody might die?

A Okay.

Q At that time?

A Okay.

Q Could you do that?

A I believe I could.

Q Could you, ma'am envision a set of circumstances where someone might deliberately shoot someone and not have a reasonable expectation that that person might die?

A Yes, I think that is possible.

Q Okay, or would you possibly think that because a person went into a place with a gun that they had already

formed the intent to do what [p. 2227] they were going to do and if they had to use that gun, they would have already made up their mind that they were going to kill somebody?

A Well, I think that if they would take a weapon with them they might possibly have it in the back of their mind they may need to use it.

Q Now, with that feeling, would you still be able to be fair and impartial in determining whether the person had a reasonable expectation that somebody might die or would you automatically think that they had the gun and could possibly use it, that they knew?

A It would be – it would depend on circumstances around the using of the weapon.

Q Okay, you would look at all the circumstances in their totality before you made a decision?

A Right.

Q That is all we can ask you to do is to be fair to both sides, to look at it and that is what I think my question is couched in is whether you could be fair and open minded, and listen to the evidence and then make that determination, yourself, as to whether Part A or Part B or both should be answered yes, and [p. 2228] that is all I think we are asking you to do. Could you do that?

A I believe I could.

Q As relates to issue number two, ma'am, what kind of information would you like to have brought to you to help you make that determination?

A Whether or not it was predetermined that the gun was going to be used.

Q We are talking about issue number two whether the person would be a future threat to society?

A I think it would depend on past experiences.

Q In other words, I think you are saying –

A If it is a habitual thing that has occurred or reoccurred or if this is the first time.

Q But you would like to have, I think it would be a fair statement to say that you would like to have all the information that would be available to you before you made a decision?

A Right.

Q Now, the law is, the law doesn't say you cannot use that information from special issue number one to help you formulate your answers to special issue number two, but what [p. 2229] the law, what we are asking you is that because you found special issue number one to be answered yes and had found him guilty that – would you automatically find that that person will be a continuing threat to society?

A I think it would be based on his previous actions.

Q Is it – you would wait until you hear all the evidence before you made your decision?

A Yes.

Q Now, special issue number three, that goes to mitigation rather than justification. There is no justification as far as excusable justification under the law for the

taking of the life of another during a robbbery, but in this instance, you do get to look at not only the actions of the person who took the life, but the actions of the person who was ultimately killed to determine if the person who took the life acted reasonably in light of what the person that was killed was doing and toward that end, ma'am, I will give you an example, a person that may have been in his place of business, doing what he was supposed to do, minding his business, had a right to be [p. 2230] there, protecting his own property that he has worked for. Someone comes in to rob him. Well, he is tired, he is absolutely tired. He has been robbed several times before and he makes a reach, now we don't know exactly what he is reaching for, he doesn't have a gun up. We don't see a gun, but there is a sudden move and as a result of that sudden move the person who is attempting to rob him shoots him, thereby causing his death.

You may or may not find that provocation. My question is to you, ma'am, is this, could you conceive in your mind a set of facts or circumstances where the person who was there protecting his property did something in furtherance of the protection of his property as he has an absolute right to do, and as a result of what he does in protecting his property he is killed, would you, ma'am, also automatically find that killing to be unreasonable?

A I think it would depend on who was doing the shooting, if the person was absolutely scared to death, I think you would be more apt to shoot someone than someone who was more [p. 2231] experienced.

Q Okay. Yes ma'am, and in your answers – and I think that you are going exactly where I am going with

this is that you would not automatically find that the reaction to whatever the person did would accidentally cause his death, you would not find that reaction to automatically be unreasonable?

A I don't think so.

Q Well, I'm sorry, but I have to pin you down a little bit further than that?

A What you are asking me, I think is was – when the fellow who was protecting his property reached for whatever he was reaching for?

THE COURT: I will instruct you.

MR. MOCK: I'm not trying to lock into a situation.

A Or whatever there would be reason that the person who was coming in would think their life was in danger?

MR. MOCK: That would be something for you to conceive in your own mind. We are not trying to take you to a particular fact situation. My only question is to you could [p. 2232] you be open minded and –

A I think I would.

Q I can appreciate your attempt to be as fair as you can, and believe me, ma'am, I'm not trying to be argumentative, but I have to pin you down.

A To a yes or no?

Q If you can or couldn't

A Yes.

Q You could be open minded and fair and listen to the facts and then make up in your own mind as to determine what you might think is reasonable or unreasonable?

A Yes.

Q Before you made a decision?

A Yes.

Q Is there anything else that you might have, ma'am?

A Sir?

Q Is there any reason you might have whatever it may be that you could not be a fair and impartial juror and listen to the facts and evidence as presented in this case?

A Would you repeat that, sir?

Q Is there any reason whatever it may be that [p. 2233] you could not be a fair juror?

A No.

Q And listen to the facts and evidence presented in this case?

A No.

MR. MOCK: Your Honor, we will pass.

THE COURT: What says the State?

MR. HOBBS: The State would accept.

MR. MOCK: For purposes of the record we will accept also, if we had the opportunity.

THE COURT: Will you stand and be sworn as a juror in the case, please?

(At this time juror sworn.)

THE COURT: Ms. Gaylord, as I said, we anticipate we will begin Monday morning. We have one more juror that we must obtain prior to our beginning testimony, and whether or not we are able to get the person this afternoon or Monday, I'm not certain. Hopefully, we will be able to give you a phone call this afternoon or this weekend and let you know whether or not we are going to begin Monday morning. Deputy White down here is the individual who will be giving you a call, [p. 2234] either he or Deputy Pollinger, who are assigned to my Court. We have a work number and a home number for you where we can reach you at. Deputy White, before you leave, will give you a slip of paper with his name, Deputy Pollinger's name and the phone number for the Court, so if it is necessary for you to contact us in some way, you will be able to do so. So, if you need anything at this time, I guess not, since the trial is going to start Monday, I was going to tell you we would give you written verification for the people at the school district, so I can assume we can give that later.

JUROR: Do you think we will go past next week?

THE COURT: We don't know. We don't anticipate that.

JUROR: Okay.

THE COURT: Thank you, Ms. Gaylord.

[p. 2235] MR. MOCK: Your Honor, before the juror is brought in may we, for the record – Your Honor, we are most appreciative of the Court's indulgence in granting us an additional strike, however, we would note that we do have a jury of 12 veniremen that have now been empaneled to sit in judgment on this case. We would also needlessly remind the Court that we are now out of strikes. We would ask the Court in an effort of justice and fair play, Your Honor, in the alternate process, we have used our strikes in picking the original panel, we would ask for one strike for the pick of the alternatives.

THE COURT: That request is denied, Mr. Mock.

MR. MOCK: Thank you, Your Honor. Please note our exception to the Court's ruling.

THE COURT: May we have Ms. Faye Martin, please.

[p. 489] THE COURT: Please be seated ladies and gentlemen, I now read you the Court's charge.

(At this time Court reads the charge).

THE COURT: Mr. Hobbs, you may proceed.

MR. HOBBS: Your Honor, the State would respectfully waive the right to open and reserve the right to close, Your Honor.

THE COURT: Mr. Thornton, you may proceed, sir.

MR. THORNTON: If it please the Court, Mr. Hobbs, ladies and gentlemen of the jury. I would like to first take the opportunity to thank each and every one of you all for coming down and fulfilling your civic obligation to sit on the jury. I am sure you know this is a very difficult case we have to listen to. For me, it has been a very difficult situation. I am sure you have seen a lot of emotion and a lot of waiving on the forehand because in a sense, it has been very difficult decision we have to have made. At this time you ladies and gentlemen have to determine what is going to happen to [p.490] Gary Graham, whether he is going to get life in penitentiary or whether he should die. You have all heard the evidence from the witness stand concerning a number of things, a number of offenses state Gary Graham has been alleged to have been found to have committed. The fact remains we have a human life at stake. We have to make a decision on that human life. We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped

havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit [p. 491] his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own. I am sure all of you know this trial has been going on for 3 weeks. Some of you were asked questions the first day and some of you were asked questions a week or two after that. It's a long arduous process we have been through. The purpose of why we went through that process because our criminal justice system provides this with any individual who is accused of a crime, to be judged by his peers, by persons in society. Each and every one of you all. It's very difficult as ladies and gentlemen, to show compassion and consideration for an individual, apparently that didn't show any compassion for anybody else from May 13th through May 20th. It's a lot of compassion that should go out to the individuals in this case. Their lives have been changed and effected in a manner that would never be undone. Never. Degree of compassion and consideration should go to the parents of Gary Graham. Their lives have been changed to a point that can't be undone. What about Gary Graham? Will his life be changed? Certainly,

if you find him, that he should die, his life [p. 492] is definately going to change. Life in the penitentiary. The State will probably argue that this person isn't even – shouldn't even go to the penitentiary for life because if he gets in the penitentiary for life, he is going to commit crimes against other convicts of persons that work in the prison system. Well, I think it would be a bad commentary on our prison system if crime rate in the prison system is just as bad as it is out on the streets of Houston, Texas and all over the nation. Gary Graham is a young man. No doubt about it. Gary Graham has chosen a lifestyle, which to society, is not right. Nothing he did. Nothing he has been accused of is right, and cannot be condoned in society. You found him guilty of capital murder. The question is whether he should live or die. Gary Graham, in some sense, epitimous or what is wrong with our society. It is not to blame society. He epitimous what is wrong with society. A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 day, 7 days out of his life. He is not going to ever forget. You can believe it, 7 days out of the victim's life. They are [p. 493] never going to forget. I have thought long and hard about how I can ask you 12 people, who have listened to luminous amount of evidence against him, how can you ask 12 people for compassion, to show compassion for this individual. I ask myself that, but I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given

that opportunity. You say how can you stand up here and ask somebody to give somebody the opportunity when he gave no one else the opportunity. It is a very hard decision to make. It is very hard for me to ask you to do that. Ms. Blackburn testified that after Gary Graham made her life miserable for 5 hours, he was lying on the bad naked asleep. She got his gun out of his hand and she said, "I took the bullets out and I thought about what I wanted to do or what I could do. I thought about shooting him." She had them right there. He was laying out on the bed. She had the gun in [p. 494] her hand and he was asleep. She said she couldn't do it. How could a lady who's been raped, who's been robbed, who's been humiliated, find compassion for that individual to the point that she couldn't take his life. How could she do it? How can you do it? It is something that has, the human being in all of us, I imagine, it is a very difficult thing for her to do. Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harrassed people. He stuck guns in their face. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe. Ladies and gentlemen, I only have a brief comment to make. After I'm finished, Mr. Mock will get an opportunity to talk with you. We have talked to each and every one of you all through voir dire, and we have asked each and every one of you questions and matters about your personal life, to find out what type of individuals you were, to be able to judge this person right here. Gary Graham. In some way, ladies and gentlemen, I would hope that you find some way, either in your heart based

on the [p. 495] evidence, find some compassion for that human being. I thank you.

THE COURT: Mr. Mock?

MR. MOCK: May it please the Court, Your Honor?

THE COURT: Yes, sir.

MR. MOCK: Honorable Judge Trevathan, Mr. Aduddell, and Mr. Hobbs, ladies and gentlemen of the jury, I, too would like to thank you for your attentiveness, not only throughout the guilt or innocence phase of the trial, but also during the punishment hearing. You returned a verdict based on an oath that you have taken that is still in effect, that you would render a verdict according to the law and the evidence as presented. I told you when I talked to you first that we would not quarrel with your verdict. The province of the jury is most sacred. I'm just appreciative of the fact that you weren't back there and discussed it, that you did what we asked you to do then. Look at the facts. Try the facts. You are also given a charge by the Court in this instance for punishment, and I don't know. I know you have all seen them before, but this is the law and this will be the [p. 496] only things you can take back with you, that will give you the answers, and each and every one of you individually talked with us about the three questions that you will have to answer. The State has put on a lot of evidence, a lot of what we call extraneous evidence, offenses for which Gary Graham is not on trial today, but they can do it in order to show you what they think is evidence, creditable evidence, to show that he will be a

continuing threat to society, that he will commit continuing criminal acts of violence. That in the end, the bottom line is this, ladies and gentlemen, see, it is couched in the special issue. It's easy to answer special issues, but we also talked with you about the bottom line, the cause and effect. Life or death. And that is simply what it means, and it can't be put any simpler. Whether you, ladies and gentlemen, believe beyond a reasonable doubt, based on all the evidence that you have heard, not only evidence which is on trial now, but other extraneous offenses for which he has is not on trial, and doesn't have to answer at this time, as to whether a man should live or die. See, because you found him guilty, we are past that [p. 497] phase now. The question now is what punishment for this crime, what punishment for this crime, the crime for which he has stand charged, and accused, charged and now convicted, for the death of Bobby Grand Lambert. Needless to say, there are many victims in this case, and I'm not going to take you on a guilt trip of being a member of society and place it at your fault for his actions. I'm certainly not willing to take the blame for his actions. I'm not going to ask his Mother, Grandmother and Father out here to take blame for his actions. There's only one person that is going to be punished. That young man. That young man. For what he has done. And you don't have to sit back and consider how long he should go to the penitentiary for. What we should do, because there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish. You wouldn't have the word punish if you didn't have the thought that there would be something forthcoming

from that punishment, not only for the person punished, but also for the people upon whom he inflicted some type of punishment. First, [p. 498] robbery. Sheer retribution. Make a person pay for what he has done. Make a person pay for the actions which they have committed by their own hand. Second reason, as a deterant [sic] to show others. We are going to show the others in Harris County, Texas, who have committed offenses that they shouldn't go out and do these things because we are going to kill Gary Graham. All ya'll folks out there who want to hijacked and happen to shoot somebody while you are jacking, all you folks that want to rob, rape and pillage stand up and take notice because we are going to kill Gary Graham. Don't do this anymore because you see what is going to happen to him? We are going to kill him. That and a quarter, maybe now a dollar, will get you a cup of coffee. If you think it is going to stop somebody who don't think about what he is doing in the first place, ladies and gentlemen, I purport to you that it won't. I purport to you that the death penalty is not a deterrant [sic] to crime. It is a punishment, maybe in an appropriate case, but it is not a deterrant [sic] to crime. You read the papers. You see what is happening. If we are looking for blame, if we are looking for scapegoats, they are [p. 499] easy to find, but we are not about that now. You are not going to go back there and do a psychiatric analysis of Gary Graham or the society in which he lives. Those are not the issues which you will have to answer. But you have to decide whether it's a deterrant [sic], whether taking his life, which will not bring back Bobby Grant Lambert, will not make any victims whole again. None of them will be whole again. It's nothing that can be

replaced. The first reason is rehabilitation, and you know when I think about that word, rehabilitation, it kind of makes you wonder, because before you can be rehabilitated, you have got to be rehabilitated. Where do you get a chance to rehabilitate somebody. Sure, they have some opportunities in the penitentiary, but the penitentiary, ladies and gentlemen, is strictly for warehouse commutes, for putting people away from society. Telling them that because of your actions, you will not be able to live among the rest of us. We do not condone nor will we tolerate your actions. We will put you over here where there are a lot of people just like you. Don't give you much of a chance to rehabilitate yourself. But you know, that [p. 500] society is better off because a person is away from society. See, you don't live in the penitentiary. You exist. So you think about one thing that is going to happen to everybody here except Gary Graham, regardless of what your decision. We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham would become a person fit to return to society. At least he is alive. See, when you are 17 to 20, you are young, hot-to-

trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and [p. 501] middle 30's, a change a little bit from you more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. We get a lot of DWI's because we have to put up with society, but visually, ladies and gentlemen, criminal acts, because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. I'm asking you, ladies and gentlemen, to give the man a chance to live, to exist, to exist, but the decision is yours, ladies and gentlemen. I'm asking you to give him a chance to live, but I'm asking you to go back there and look at the facts, look at the case, look at Gary Graham, because see, Mr. Hobbs is going to tell you that we protected his rights up to now. We have. Now is the time to look for the rights of society. Sure. I'm for law enforcement. Ladies and gentlemen, I'm for it. I'm for protecting your home, my home and my children and your children, but we still get back to a bottom line. The life or death of another human [p. 502] being. Compassion. Heart. This is one of those situations where you have to dig deep and think. Be very easy to go in there and say well, we don't have to worry about Gary Graham no more. We can just kill him and go on home. That is the easy way. The hard thing to do is what I'm asking you to do. Tear it apart. You don't know. You have know [sic] a little bit about Gary Graham, sure, but what his Grandmother told you, but you don't know that much about Gary Graham. You really don't. You know for

certain that during the week from May 13 to May 20th he was mean, see, you have a one week life span to deal with. A one week life span. You don't know that much about before that day. You don't know. You also don't know what caused it. See, the State doesn't have to show you [sic] motive, and I'm not trying circumvent or give them another burden because they don't have that burden to show you why. We don't have a burden to show you why and you don't know why. These are things that you have to speculate on, just like you have to speculate as to whether he will be a continuing threat to society. It is a burden I wouldn't want. It is a burden I would hate to assume, but see, by [p. 503] being able to live, ladies and gentlemen, in a society that we live in, with all the rights and privileges we enjoy, this is one of the relative duties we must assume. I appreciate you for doing it, but in no way, at no time, makes your task any easier because these are things you are going to have to live with. This is one of the toughest decisions you will have to make in your life, as to a person living or dying. Why help Gary Graham keeping him alive? Why help him? Well, if that is the way you feel, you are not listening to what I am saying anyway because he has got to be punished. He is going to be punished, not only here on earth, but he has to meet his God, also, whether he knows he has one or not. He will be punished by his Maker, also, because He knows what has happened. He knows whether all of these things the State brought you is true or not. You don't. I can believe you can believe but we don't know. We don't know what makes Gary Graham tick. I'm asking you, ladies and gentlemen, to look into your hearts, look deep into your hearts. I was – I was really amazed

somebody was asking me the other day about the witness and the deceased wife. Is the heart [p. 504] that big? Is you [sic] heart that big? I ask you for Gary Graham's life. Thank you, and God bless you.

THE COURT: Mr. Hobbs, you may proceed.

MR. HOBBS: Thank you, Your Honor. Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. And I stand before you now and I ask you on your oath as jurors to follow the law. And you, each of you, as individuals, as a group, represent the people, and there are certain individuals in our society that we have got to look at. And we have got to realize that are not fit to live with us. The evidence beyond a reasonable doubt shows that Gary Graham is not fit to live in this society, that he will constitute a continuing threat to society. Compassion? They ask for compassion. We ask you for his life. Compassion, in taking the life of Bobby Grant Lambert? Compassion in shooting Greg Jones? Compassion for Richard Carter? Compassion for Linda Jennings? Compassion for Mr. Salsgiver? Compassion for Ms. Blackburn. Not one ounce. Not one ounce. Your task is not [p. 505] an easy one. You, as individuals, must look at that, but all of us, each of us in our daily lives, in those few times when our lives must stand back and look at ours and ask ourselves what are we made of. What are we made of. Rights of the individuals of this society. The life of Bobby Grant Lambert. They say look at his youth. When does a human life taken the way he took that life of Bobby Grant Lambert cease to have meaning? It ceases to have meaning when the terror and the degradation of a man such as him holds that life

in his hand. Not by law. Not by the law of society. Not one ounce of that law of society. Not 12 people deciding the fate of an individual, but him alone. Compassion? Care? Have you just looked at him? Sure. Ms. Blackburn didn't kill him. Respect of the law. Respect to the law. Any – of any human being. Yes. Gary Graham has showed you a lot. And Gary Graham put himself exactly where he is at, and Gary Graham. Gary Graham. Not why, but what did he do. And you look at his motive, and you look at everything. Motive. We don't have to prove that. You look. You look at what he did. Your think about it. Care. Conduct. That caused the death of [p. 506] Bobby Grant Lambert. You can bury Bobby Grant Lambert in that parking lot in that concrete, in the degradation. Him and make his life meaningless. And the jury and the degradation and humility that he caused these people. You have that. Yes, look into yourselves. Death is the only protection that you, as the jury, and society can protect from people and especially Gary Graham. The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? And where has he sowed those seeds? In the fertile earth? No. He buried Bobby Grant Lambert in the earth. His seeds are death. Pain. Suffering. Humiliation. Degradation. What do those things bring? But one thing tell you what Gary Graham is. You have seen his actions. You have heard from the mouths of these people. Deliberate conduct. Stop and think about what Ms. Skilern told you, and Mr. Grady, as an individual in his 50's is walking down from a store to a parking lot. Isn't it strange that he just loves parking lots. Approaches that individual an armed individual, an individual better than 30 years of age. For what. To rob. Deliberate act. He

brings that [p. 507] gun up and he grabs him, and what is Bobby Grant Lambert trying to do? He is trying to just get away. Doesn't swing at him. Just wants to get away. He comes up with that gun to his head. That tells you what Gary Graham thinks and is. Does he stop? No. He doesn't stop. And they ask you to let him continue. Society has a right to have Gary Graham stopped. Under the law, that last protection for those individuals of which Gary Graham is a prime example, and ever after Ms. Skilern draws his attention to her and they are spread apart and what, if anything, is Bobby Grant Lambert doing? Nothing. And what is Gary Graham doing? He takes death in his hand. Arm extended. Shoots and kills Bobby Grant Lambert. Why? For no reason. Reasonable expectation of death. Within 3 or 4 feet of each other. Arm extended to his chest, and a bullet through his heart. Reasonable. Compassion? Why not justice. Why not revenge. Justice under the law. The death of Gary Graham. Whether the conduct was reasonable in response to any provocation by Bobby Grant Lambert. What provocation? Trying to get away, and an unarmed 50 year old man trying to get away from a young killer. Backing [p. 508] away. No threat. No harm. Nothing to Gary Graham. And that life is gone. The law is all that we, as a society, have to protect the weak among us, and to take away those individuals and capital punishment is for that extreme case. To take away, to take away those individuals that, by their very actions, by the reasonable expectation and the probability of their continuing acts of criminal violence, will damage society. Your task. No, I'm not going to tell you that it's easy. But under the evidence and beyond a reasonable doubt it is the only proper

verdict. Yes, special issue number one. Yes, to special issue number two. Yes, to special issue number three. Beyond a reasonable doubt. The life of Bobby Grant Lambert. The terror of this woman. The humiliation, degradation, the life that he almost snuffed out here. The people he scared here. And as he knelt with that shotgun to his head, was he thinking compassion? He was thinking of doing, not by law, not by any consideration of the law, but the lawleness [sic] and the terror of Gary Graham. Gary Graham. He made no differentiation in those. Stop and think. His Grandmother is roughly the same age as Ms. [p. 509] Blackburn that he raped and robbed and he degraded. And Mr. Salsgiver. Their rights. Their rights to be free, to walk from their job to their car without fear of getting – while working on your job and going home, each of you work. Each of these people are working to better themselves. And yes, Gary Graham is working. He is working. He is using that terror and death and mutilation on your street. The streets of your community. On the parking lots and parking garages of your community. Task under the law. Under the evidence in your oath as a juror. Each and every witness is there. Beyond a reasonable doubt. I submit to you it's way beyond a reasonable doubt. Sawed-off shotgun to kneeling ladies. Ladies and gentlemen of the jury, caliber of the weapons. Sawed-off shotgun. Shot off in lots. Stuck in faces. Both up in the teeth and like behind the head as they begin to scream, and as you heard her say and what he was doing. Compassion? Did he give compassion to any of these folks. The law is the last protection of society. He preys upon those he can, and every one that he can. I submit to you that Gary Graham, by his actions, by his conduct, that the

probability [p. 510] based upon what you have seen demonstrated by his very conduct. Yes, as to special issue number one. Yes, as to special issue number two. And yes, to special issue number three, and the death of Gary Graham. Thank you.

THE COURT: Ladies and gentlemen, you may retire to deliberate upon your verdict. The Court will be in recess to await the jury's verdict.

(At this time jury deliberated on their verdict).

THE COURT: Both sides ready for the jury?

MR. HOBBS: Yes, Your Honor.

MR. MOCK: Yes, Your Honor.

THE COURT: Please seat the jury, Mr. Pollinger.

(At this time jury put in jury box).

THE COURT: Please be seated. Please be seated. Mr. Bradley, has the jury reached a verdict?

FOREMAN: Yes, Your Honor, we have.

THE COURT: Would you hand it to the Bailiff, please.

The jury verdict in Cause 335,378,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
TEXAS HOUSTON DIVISION

GARY GRAHAM, Petitioner, V. JAMES A. LYNAUGH, Director, Texas Department of Corrections, Respondent.	))))))))	CIVIL ACTION NO. H-88-563

MEMORANDUM ON THE DENIAL OF A STAY OF EXECUTION AND WRIT OF HABEAS CORPUS

1. Statement

Gary Graham is sentenced to die by injection before sunrise tomorrow, February 25, 1988, and has applied for a writ of habeas corpus and moved to stay his execution. In addition to the pleadings and exhibits filed in this Court, the Court has had before it for its consideration prior to the issuance of this Memorandum and Order the entire 20-volume transcript of the state court proceedings, the transcript of the state court habeas corpus evidentiary hearing held on January 8, 1988, the findings of fact and conclusions of law of the state court, and the opinions of the Texas Court of Criminal Appeals relevant to this case. Both the writ of habeas corpus and stay of execution are denied.

2. Background

Graham was convicted of capital murder and sentenced to death for the shooting death of Bobby Grant Lambert during a robbery in a Houston grocery store parking lot in 1981. Both guilt and penalty phases of the trial were to tried to a jury.

Before filing this federal action, Graham has pursued a direct appeal to the Texas Court of Criminal Appeals. The conviction was affirmed in an unpublished per curiam opinion. *Graham v. State*, No. 68,916 (June 12, 1984).

On July 13, 1987, Graham filed his application for a writ of habeas corpus in the state trial court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1987-88). The trial court conducted an evidentiary hearing on January 8, 1988. On February 9, 1988, the state district court entered findings of fact and conclusions of law recommending relief be denied, and ordered the record transferred to the Texas Court of Criminal Appeals.

The Texas Court of Criminal Appeals denied relief on February 19, 1988.

3. The Standard for Issuance of a Stay of Execution

The petitioner must show that there is a question of some substance or that there is a substantial showing of the denial of a federal right. He need not show that he will prevail on the merits; he need only show that the issues are debatable among jurists of reason, that a court could resolve the issues differently, or that the questions are adequate to deserve to proceed further.

4. Evidentiary Hearing

In a habeas proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend v. Sain*, 372 U.S. 293, 312-313 (1963). This Court finds that the state court has afforded Graham a full and fair hearing and that all material facts have been developed. Therefore, this Court finds that an independent evidentiary hearing is not required.

Further, pursuant to 28 U.S.C. § 2254(d), factual findings of the state court must be presumed to be correct unless the Petitioner can establish by convincing evidence that those findings are erroneous. *Sumner v. Mata*, 449 U.S. 539 (1981). This Court finds that Graham has not shown by convincing evidence that the factual findings made by the state court are incorrect.

5. Imposition of Death Penalty on Defendant, Age Seventeen at the Time of the Offense

Graham contends that his death sentence is cruel and unusual punishment under the eighth amendment to the United States Constitution because he was 17 years of age at the time he committed the offense for which he has been sentenced to death. The Fifth Circuit has held that nothing in society's standards of decency compel more than *consideration* of youth as a mitigating factor. *Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir. 1984) (imposition of the death penalty on a youth, seventeen years old at the time of the offense). This Court finds *Prejean* controlling in this case.

Further, this Court finds the case of *Thompson v. Oklahoma*, United States Supreme Court No. 86-6169, cited by Graham, not on point, because of the difference in ages of the defendants. *Thompson* was argued before the United States Supreme Court on November 9, 1987, on the issue of whether sentencing a defendant to death, who was 15 years old at the time of the offense, constitutes cruel and/or unusual punishment. *See Thompson v. State*, 724 P.2d 780 (Okla. Crim. App. 1986), *cert. granted*, ___ U.S. ___, 107 S. Ct. 1284 (1987). As previously stated, the Petitioner was 17 years of age at the date of the incident in question.

6. Unconstitutionality of the Texas Death Penalty Statute

Graham asserts that he was convicted under an invalid Texas death penalty statute, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987-88), because jury question number two during the penalty phase of trial improperly "precluded the jury in Petitioner's case from considering various types of mitigating evidence." The United States Supreme Court has recently reaffirmed that the Texas death penalty statute permits "the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator." *Lowenfield v. Phelps*, 56 U.S.L.W. 4071, 4075 (U.S. Jan. 13, 1988) (citing *Jurek v. Texas*, 428 U.S. 262, 271-274 (1976)). Therefore, this Court finds Graham's argument is without merit.

Graham also claims that the Texas statute is unconstitutional in that it "rendered trial counsel legally ineffective by forcing him to fail to present relevant mitigating evidence." Graham references the Court to

Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). Additionally, Graham urges that the statute's failure to define mitigating circumstances renders Graham's conviction unconstitutional, citing *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987), *cert. granted*, 46 U.S.L.W. 3287 (U.S. Oct. 9, 1987).

As *Jurek* expressly held that the Texas statute is constitutional, this Court also so holds. This Court has also considered Graham's argument regarding the trial court's failure to instruct the jury regarding mitigating circumstances due to the state district court's factual finding that defense counsel failed to object, but finds that Graham has not demonstrated that the charge as a whole was so clearly erroneous as to result in a grave miscarriage of justice. *United States v. Varkonyi*, 645 F.2d 453, 460 (5th Cir. 1981) (citing *United States v. Franklin*, 586 F.2d 560, 569 (5th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979)).

7. Petitioner's Present Competency to be Executed

Graham's fourth claim is that he is not competent to be executed under the standard set forth in *Ford v. Wainwright*, ___ U.S. ___, 106 S. Ct. 2595 (1986).

Although Graham attached psychiatric reports to his petition which were dated June and July, 1986, the most recent evaluation of Graham's competency occurred on August 25, 1987. Dr. Jerome B. Brown found that Graham exhibited "no credible signs of severe psychiatric disturbance or psychological impairment that seems genuine." After the evidentiary hearing on January 8, 1988, the state district court found that there was "no credible evidence

from any source to indicate that [Graham] is not competent to be executed."

This Court finds that Graham has failed to make a showing that he is not competent to be executed.

8. Ineffective Assistance of Counsel

Graham suggests that he was denied effective assistance of counsel at the trial because of numerous alleged shortcoming [sic] of defense counsel.

A two-prong test for determining ineffective assistance of counsel has been established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, Petitioner must show that counsel's performance was deficient which requires "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 680. Second, Petitioner must show that the deficient performance prejudiced his defense such that he was deprived of a fair trial. *Id.* Further, competency of representation is not to be judged by hindsight or by facts unknown at the time of trial. *Id.*

Graham alleges twelve separate assertions of purported errors or omissions by his trial counsel team.

A. Graham alleges that counsel failed to conduct an adequate pretrial investigation of the case by failing to interview all of the witnesses and all possible mitigation witnesses. The state district court found that Graham did not furnish counsel with the names or addresses of the potential alibi witnesses. This Court finds that counsel's

actions were reasonable [sic] based on the information supplied them by Graham at the time.

B. Graham asserts that counsel failed to obtain an independent psychological-psychiatric examination for purposes of mitigation. Defense counsel were not ineffective for failing to request a third psychological evaluation of Graham as both doctors who had previously examined him reached similar conclusions declaring him both sane and competent. *See Beans v. Black*, 757 F.2d 933, 936 (8th Cir. 1985) (defense counsel's failure to obtain second opinion regarding defendant's competency was not unreasonable under *Strickland*).

C. Graham claims that counsel Ron Mock knew personally the State's key witness and failed to disclose this personal relationship to Graham. The state district court made the factual finding that Ron Mock did not have any personal relationship with the State's eyewitness, Bernadine Skillern, and that there was no credible evidence to believe that Ron Mock had a conflict-of-interest with his client. This Court finds that Graham has not demonstrated that an actual conflict of interest arose. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (citing *Glasser v. United States*, 315 U.S. 75-76 (1942)) (a defendant who raised no objection at trial must demonstrate that an actual conflict of interest affected his attorney's performance).

D. Graham also asserts that defense counsel was made aware of at least four witnesses who could testify as alibi witnesses. The state district court found that the names and addresses of the four potential alibi witnesses were never given to counsel. This Court has examined the

affidavit of counsel attached to the transcript of the evidentiary hearing held January 8, 1988, and also finds that counsel did not fail to investigate or produce witnesses of which he was informed. This Court finds no indication of ineffective assistance in counsel's actions.

The Court has also considered Graham's additional allegations of ineffective assistance of counsel: "counsel knowingly allowed the petitioner to be tried in the same clothes that he was wearing on the date of his arrest"; "counsel refused to allow the petitioner to testify in his own behalf at the guilt-innocence phase or at the punishment phase"; "petitioner's counsel totally failed to develop a proper trial strategy"; "petitioner's counsel totally failed to request a limiting instruction at the punishment phase of the trial concerning the extraneous offenses which were introduced into evidence"; "petitioner's counsel only called two witnesses to testify in mitigation of the petitioner's punishment"; "petitioner's court-appointed counsel failed to call . . . four witnesses [who] were with the petitioner on the alleged date of the offense"; and "Attorney Mock '*discovered from listening to testimony* that one of the robberies committed by Graham took place within a few yards of Mock's house in southeast Houston' according to Houston Chronicle reporter Alan Bernstein." The Court, based upon an examination of the record, finds that all of these allegations of Petitioner are without merit.

9. Unconstitutionality of the Texas Death Penalty Statute

Claim VI of Graham's petition asserts additional grounds for the unconstitutionality of the Texas death

penalty statute: (1) lack of "sentence review," (2) lack of comparing death sentences on a state-wide basis resulting in disparity of punishments, (3) lack of trifurcated system, (4) lack of informing the jurors of the result of their answers to the special issues, and (5) admissibility of unadjudicated offenses.

As stated above, this Court finds *Jurek*, 428 U.S. at 262, controlling and finds the Texas death penalty statute constitutional.

10. Exclusion of Jurors

Graham is a black male who was under eighteen years of age at the time of the commission of the offense. Graham urges that (1) blacks were systematically excluded from the jury panel pursuant to *Witherspoon;* (2) the Grand Jury was substantially under-represented by blacks and all individuals under 18 were excluded from service; (3) the trial jury was substantially under-represented by blacks and all individuals under 18 were excluded from jury service; and (4) the district attorney prevented the jury from being representative of blacks by his use of challenges for cause and peremptory challenges.

Graham has failed to prove that pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), blacks were systematically excluded from the jury panel by challenges for cause because allegedly a larger percentage of blacks are against the death penalty.

Graham has also failed to show that the grand jury and the trial jury was under-represented by blacks for

any reason. Mere conclusory allegations in an application for federal habeas relief fail to rise to a prima facie showing of discrimination and fail to trigger *Batson v. Kentucky. Esquivel v. McCotter,* 791 F.2d 350, 351 (5th Cir. 1986) (referencing *Batson v. Kentucky,* ___ U.S. ___, 106 S. Ct. 1712, 1722-1723 (1986)); *see also McClenskey v. Kemp,* ___ U.S. ___, 107 S. Ct. 1756, 1766 (1987) (equal protection violation requires showing that decision makers acted with "discriminatory purpose").

Graham has also not shown that the exclusion of all individuals under the age of 18 violated his right to a fair and impartial trial.

SIGNED at 7:10 p.m. on February 24, 1988, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
TEXAS HOUSTON DIVISION

GARY GRAHAM, Petitioner, V. JAMES A. LYNAUGH, Director, Texas Department of Corrections, Respondent.	)	CIVIL ACTION NO. H-88-563

ORDER DENYING STAY OF EXECUTION, WRIT OF HABEAS CORPUS, AND CERTIFICATE OF PROBABLE CAUSE FOR AN APPEAL

1. Gary Graham's motion to stay the execution of the death sentence of the 182nd District Court of Texas is denied.

2. Gary Graham's application dated February 23, 1985, for a writ of habeas corpus is denied.

3. Gary Graham's motion for a certificate of probable cause for an appeal is denied.

SIGNED at 7:10 p.m. on February 24, 1988, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
United States District Judge

Gary GRAHAM, Petitioner-Appellant,

v.

James LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals,
Fifth Circuit.

Aug. 31, 1988.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, KING and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Gary Graham, seven years after his conviction in the Texas state courts for capital murder, is before us for the first time and petitions this court for a certificate of probable cause, seeking a stay of his execution and habeas relief under 28 U.S.C. § 2254. We granted a temporary stay of his execution, received briefs, and heard argument so that we could consider his petition more closely. After a thorough review, we are convinced that Graham's contentions are meritless and that he has failed to make any showing of the denial of a federal right. We therefore deny Graham's petition for certificate of probable cause. Nevertheless, in order that the Supreme Court may have an opportunity to consider this case, the

temporary stay will not be lifted until 12:01 a.m., September 30, 1988.[1]

I

This habeas corpus petition arises from Graham's conviction in 1981 in Texas state court for the felony offense of capital murder. Graham, who was seventeen at the time of the crime, was represented by two attorneys who developed a defense around mistaken identity. Counsel advised Graham against testifying, and he followed this advice. No alibi witnesses were called, and only two mitigation witnesses testified during the sentencing phase. Graham was found guilty and sentenced to death.

Graham appealed his conviction to the Texas Court of Criminal Appeals. He argued that the trial court improperly excluded five prospective jurors and denied a limiting instruction regarding extraneous offenses. On June 12, 1984, in an unpublished per curiam opinion, the court of criminal appeals affirmed the conviction. it was not until June 26, 1987, however, that the trial court set the execution date. Execution was set for July 30, 1987.

Graham then began these efforts for postconviction relief when he petitioned the Texas state district court. Because the petition was not filed until July 13, 1987, less than three weeks before the scheduled date, execution was postponed to allow time for judicial review. After the

[1] Cases are pending that may have related issues. *See* notes 2 and 8 *infra*.

district court conducted an evidentiary hearing on January 8, 1988, the court entered findings of fact and conclusions of law recommending denial of relief. The Texas Court of Criminal Appeals then denied relief on February 19, 1988. Graham's execution was then rescheduled for Februry 25.

Graham filed this petition for a writ of habeas corpus and stay of execution in federal district court on February 23, 1988. The district court found that all relevant facts had been developed by the state court and adopted the state court's factual findings. *See Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). After reviewing Graham's legal contentions, the district court, on the eve of Graham's scheduled execution, determined that his claims were meritless, denied relief and denied a certificate of probable cause.

Graham immediately appealed and asked this court to grant his petition for a certificate of probable cause. We issued an order temporarily staying Graham's execution so that we might have more time to examine his request. *See e.g., Henry v. Wainwright*, 743 F.2d 761, 762 (11th Cir. 1984). After submission of briefs and oral argument, we now address the questions before us.

II

The standard for granting a certificate of probable cause "requires petitioner to make a 'substantial showing of the denial of [a] federal right.' " *Barefoot v. Estelle*, 463 U.S. 880 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983) (quoting *Stewart v. Beto*, 454 F.2d 268, 270, n.2 (5th Cir.

1971), *cert. denied*, 406 U.S. 925, 92 S.Ct. 1796, 32 L.Ed.2d 126 (1972)). In the light of this test, we turn to the issues before us.

A.

First, Graham asserts that his death sentence violates the eighth amendment because he was seventeen at the time of the offense. Graham contends that, despite Texas state court and Fifth Circuit precedent to the contrary, this issue is meritorious because recently the Supreme Court has called into serious question the application of the death penalty to teenagers. *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion). Upon reviewing the *Thompson* decision, we find that it offers Graham no help. In a plurality opinion, Justice Stevens concluded that the eighth amendment prohibits the execution of an individual who is under sixteen years of age at the time the crime was committed. *Id.* at ___, 108 S.Ct. at 2700. Justice Stevens based the decision upon what he considered to be the current "evolving standards of decency." *Id.* at ___, 108 S.Ct. at 2691. The opinion examined the capital punishment policies of all the states and found a consensus that imposition of capital punishment upon someone who is under sixteen years of age is "now generally abhorrent to the conscience of the community." *Id.* at ___, 108 S.Ct. at 2697.

Justice O'Connor, although concurring in the judgment, declined to find expressly that a national consensus existed that prohibited the execution of anyone under the age of sixteen. *Id.* at ___, 108 S.Ct. at 2704-05. Hence she concluded only that "petitioner and others who were

below the age of sixteen at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Id.* at ___, 108 S.Ct. at 2711.

Neither Justice Stevens' nor Justice O'Connor's opinion bears any suggestion that an individual of Graham's age cannot be sentenced to death. The evidence relied on in *Thompson* simply reflected a likely consensus among the states that execution of an individual *under the age of sixteen* was cruel and unusual punishment. Neither the holding nor the rationale of *Thompson* supports an argument that the eighth amendment bars the death penalty against persons who are sixteen or older. *See* ___ U.S. at ___ - ___, 108 S.Ct. at 2691-96. Thus, *Thompson* does not aid Graham.

Graham fairs no better under Fifth Circuit precedent. This court has specifically observed that "[n]o court has ruled that in all cases and under all circumstances, the execution of those who commit capital offenses while under the age of eighteen constitutes cruel and unusual punishment." *Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir. 1984). Texas state law has similarly held that the capital sentencing of an individual who is less than eighteen years old is not unconstitutional. *Cannon v. State*, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Ferguson v. State*, 573 S.W.2d 516, 525 (Tex. Crim.App. 1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304 (1979). There are no special circumstances in Graham's case that indicate that he should be treated any differently from any other seventeen-year-old person who commits the

crime of capital murder. We therefore must conclude that Graham's first contention has no constitutional basis.[2]

B.

Graham challenges the Texas death penalty statute, Tex. Code Crim.Proc.Ann. Art. 37.01 (Vernon 1981 & Supp.1987). Under the fifth, sixth, eighth and fourteenth amendments of the United States Constitution and corresponding Texas provisions. He objects to the statutory sentencing procedure that determines punishment by allowing the jury only to answer specific questions.[3] Tex.Crim.Pro.Code Ann. art. 37.071(b) (Vernon 1981 & Supp.1987). Under the Texas scheme, only two special

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[2] We are cognizant of the Supreme Court's grant of certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). *High* deals specifically with the imposition of the death penalty on a seventeen-year-old defendant. This panel, however, is bound by Fifth Circuit precedent which holds that the execution of a defendant who was aged seventeen when the crime was committed does not constitute cruel and unusual punishment. *See Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir. 1984).

[3] He further contends that the statute does not define "mitigating circumstances" and that the trial court failed to instruct the jury on the proper treatment of mitigating circumstances. These contentions are meritless in the light of Supreme Court and Fifth Circuit decisions upholding the constitutionality of the Texas sentencing scheme. *See e.g. Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir. 1986).

issues were submitted to the jury: (1) whether the crime was committed deliberately, and (2) whether the defendant is likely to pose a future danger to society. Graham alleges that these questions do not permit the jury to weigh mitigating circumstances when formulating their answers.[4]

Graham's attack upon the Texas statutory sentencing scheme raises issues that are similar to those contained in *Franklin v. Lynaugh*, which, at the time we granted a temporary stay, was pending before the Supreme Court, 823 F.2d 98 (5th Cir.), *cert. granted*, ___ U.S. ___, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987). The Court granted certiorari on the issue of "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." The *Franklin* petitioner had requested five jury instructions that would have informed the jury that they should consider all mitigating evidence in answering the Texas statutory questions. ___ U.S. ___, ___, ___, 108 S.Ct. 2320, 2324, 2325, 101 L.Ed.2d 155 (1988). The requested instructions further stated that the jury could answer the statutory questions in the negative if they found any evidence mitigating against the death penalty. ___ U.S. at ___, ___, 108 S.Ct. at 2324, 2325. The trial court refused these special jury instructions and Franklin asserted that because the Texas sentencing scheme did not allow the jury to consider the full range

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[4] These mitigating factors introduced at the sentencing phase, included Graham's youth and his difficult childhood.

of the mitigating evidence, his eighth amendment rights were violated. *Id.*[5]

On June 22, 1988, the court issued its plurality opinion upholding the Texas statute. *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion). Writing for the plurality, Justice White concluded that the trial court did not violate the eighth amendment by refusing to grant Franklin's requested instructions. ___ U.S. at ___, 108 S.Ct. at 2331-32. He based this holding on the conclusion that the Texas statutory questions did not prevent the *Franklin* jury from considering mitigating evidence. He stated: "It is the established Texas practice to permit jury consideration of '"whatever mitigating circumstances" the defendant might be able to show' in capital sentencing. . . . " *Id.* at ___, 108 S.Ct. at 2326. He further noted that Franklin was allowed to present, and the jury allowed to consider, the only mitigating evidence offered, i.e., his good prison disciplinary record. *Id.* at ___, 108 S.Ct. at 2328. Indeed, this particular mitigating circumstance could be considered specifically in response to the Special Issues before the jury because it related to the statutory question of future dangerousness. *Id.* in short, the plurality opinion expressly reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and thus appears to uphold the Texas statute against any argument that it limits

[5] The issue of whether the jury can consider "residual doubt" as a mitigating factor was also before the Court in *Franklin*. ___ U.S. ___, 108 S.Ct. 2320. Graham, however, does not raise this issue and we do not address it.

consideration of relevant mitigating evidence.[6] *Id.* ___ U.S. at ___, 108 S.Ct. at 2331.

Justice O'Connor, although concurring in the judgment of the court, wrote separately, joined by Justice Blackmun. Justice O'Connor's opinion took exception to Justice White's suggestion that a state may limit the sentencing authority's ability to consider mitigating evidence. *Id.* at ___, 108 S.Ct. at 2332. She noted that the Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion), held that the state could not prevent the jury "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." She emphasized her view that a jury's sentencing decision "should reflect a reasoned *moral* response to the defendant's background, character, and crime," *id.* ___ U.S. at ___, 108 S.Ct. at 2333 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, Jr., concurring) (emphasis in original)), and concluded that a state cannot prevent the jury from considering the full scope of relevant evidence that might mitigate the defendant's culpability for the crime. Justice O'Connor reconciled her broader view with the judgment in *Franklin* by noting that the only mitigating evidence introduced by Franklin was that he had a good prison disciplinary record. Since the jury could consider this mitigating evidence in answering the Special Interrogatory concerning future dangerousness,

[6] We do note, however, that the conclusion of the opinion might be interpreted to limit its holding to the facts in Franklin's case. *See Franklin*, ___ U.S. at ___, 108 S.Ct. at 2325.

Justice O'Connor upheld the Texas sentencing scheme as it applied to Franklin. *Id.*

In relating *Franklin* to the instant case, we first note that the plurality opinion, and thus the judgment of the Court, clearly upheld the Texas sentencing scheme. Second, we observe, however, that the evidence relative to mitigation in this case is more similar to *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert, granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), than to *Franklin*. There were two mitigating points made to the jury here: (1) Graham was seventeen-years old at the time the crime was committed and (2) he had a difficult family life. Thus, the concerns about the Texas sentencing scheme expressed by Justice O'Connor, that the jury may be prevented from considering the full range of the mitigating evidence as it relates to the defendant's moral cuplabiity, could be directly at issue in this case.

We hold, nevertheless, that the jury's verdict in *Graham* is consistent with the constitutional requirements outlined in *Franklin* and other precedents. Indeed, we are convinced that the plurality opinion in *Franklin* only strengthens past circuit and Supreme Court decisions that indicate that Graham cannot prevail upon his eighth amendment challenge. For instance, *Franklin* reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), which expressly held the Texas death penalty statute constitutional. *Franklin*, ___ U.S. at ___, ___, 108 S.Ct. at 2325, 2328. The plurality opinion cited with approval *Lockett v. Ohio*, 438 U.S. 586 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which noted that the Texas statute does allow the jury fully to consider relevant mitigating

circumstances.[7] Following these guidelines, this circuit, upon numerous occasions, has concluded that the Texas statute does allow consideration of mitigating evidence, and that the statute is constitutional. *Selvage v. Lynaugh*, 842 F.2d 89, 94 (5th Cir. 1988); *Williams v. Lynaugh*, 837 F.2d 1294 (5th Cir. 1988), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1000, 98 L.Ed.2d 967 (1988); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir. 1986).[8] We conclude, therefore, that Graham's arguments on these grounds are meritless.[9]

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[7] Graham also contends that the jury should be informed of the effect of their answers to the sentencing questions. The state court found that the jury *did* advise the jurors of the consequences of their answers and the record supports this finding.

[8] We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925.

[9] Graham also argues that the Texas statute is unconstitutional because testimony concerning unadjudicated extraneous offenses was allowed during the punishment phase of the trial. In *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987), this court rejected a similar argument and concluded that "admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments." 814 F.2d at 208. We stand by this decision.

C.

Graham next argues that even if the Texas statute is constitutional, his trial attorney was rendered ineffective because the attorney construed the statute as precluding the consideration of mitigating factors. As indicated by the affidavit of Graham's trial attorney, the attorney was not in any way discouraged by the statute from presenting mitigating evidence of Graham's psychiatric treatment; rather, his decision not to pursue this course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced.[10] The attorney's concern was justified because, as the Supreme Court has noted in *Buchanan v. Kentucky*, ___ U.S. ___, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987), "if a defendant . . . presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant released." Finally, during the sentencing phase, Graham's attorney did obtain mitigating testimony from Graham's stepfather and grandmother concerning his childhood. The evidence reflects no other witnesses who could or would present relevant evidence on Graham's behalf. Graham's present contention that his trial attorney was ineffective because he introduced little mitigating evidence is therefore meritless.

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[10] Graham's attorney believed that the prosecution's witnesses would testify that Graham was "faking" his mental problems, that he was manipulative of others, and that he had told them it was "O.K. to rob people."

D.

In Graham's fourth contention, he alleges that he is not presently competent to be executed. Graham relies on post-trial reports filed by psychiatrists Dorothy Lewis and Johnathan Pincus and contends that there is evidence of considerable organic impairment, moderate retardation, and psychotic symptoms.

The state court, in examining these contentions, noted that Graham was examined by two psychiatrists at the time of trial and was adjudged competent to stand trial. In reaching its decision that Graham was competent both at trial and presently, the state district court stated that it

> carefully considered (1) all the psychiatric material submitted by both the applicant and the respondent, and (2) the applicant's demeanor and abilities as he testified at the evidentiary hearing held January 8, 1988. While the reports from Dr. Dorothy Otnow Lewis and Dr. Jonathan H. Pincus suggest that the applicant is mildly brain damaged, of low intelligence, and has experienced 'bipolar mood disorders,' there is nothing in the reports or evidence from any other source to indicate that the applicant is either insane or that he does not know the fact of his impending execution and the reason for it.

Moreover, the state court found that Graham was examined by Dr. Jerome Brown in January 1987 and found competent to participate in the habeas evidentiary hearing and assist his attorney. Thus the state court held that there was "no credible evidence from any source to indicate that the applicant is not competent to be executed."

Under *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981), the state court's findings must be given a presumption of correctness unless one of the conditions provided in section 2254(d) is established. *See also Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The most relevant consideration listed in section 2254(d) is whether the trial court's factual findings are "fairly supported by the record." Clearly, there is competent evidence supporting the state court's finding that Graham is competent to be executed; indeed, the petitioner cannot seriously argue that there is not. We therefore hold that Graham's contention is meritless.

E.

Graham's fifth contention is that he was denied his right to effective assistance of counsel in violation of his fourth, sixth and fourteenth amendment rights. Graham's particularized grounds are that his counsel:

(1) failed to conduct an adequate pretrial investigation,

(2) failed to interview all the witnesses,

(3) failed to obtain a third psychological-psychiatric examination,

(4) failed to conduct an adequate cross-examination of the state's key witness,

(5) failed to bring forth proper alibi witnesses,

(6) failed to request a limiting instruction concerning extraneous offenses,

(7) failed to develop a proper trial strategy,

(8) failed to provide proper clothing for the petitioner during trial,

(9) failed to call more than two witnesses during the punishment phase of Graham's trial,

(10) failed properly to investigate the alleged extraneous offenses admitted into evidence against Graham,

(11) failed to order an independent psychiatric examination of Graham, and

(12) failed to allow Graham to testify at the guilt/innocence phase or the punishment phase of the trial.

The affidavit submitted by Graham's original defense counsel has a particular bearing on these assertions. The state court credited Graham's trial counsel and determined that Graham's counsel had conducted himself in a competent manner. For example, the state court's factual findings show that graham's counsel met with Graham on numerous occasions to discuss the case with him. Graham stated only that he did not commit the crime and did not inform his attorney of any witnesses who would support his contention or explain where Graham had been at the time the crime occurred. The state court specifically determined that the alibi witnesses upon whom Graham now relies were never available to Graham's trial attorney. Moreover, the court found that three of the four alleged alibi witnesses did not offer credible testimony.[11] The defense counsel also hired an

[11] The witnesses submitted a written affidavit over five years after Graham's conviction for capital murder. One witness testified that the affidavit was prepared by a third party and the witnesses only signed the statement.

investigator to interview possible witnesses, and filed a motion for sanity and competency evaluation. It was further found that counsel had valid reasons for failing to request a third independent psychiatric evaluation of Graham.[12] Counsel also used his personal funds to buy Graham suitable clothing for the trial. Counsel further attempted to obtain numerous mitigation witnesses, but only two would agree to testify favorably for Graham. Credited testimony showed that counsel advised graham that he had the right to testify but counsel's legal view was that Graham would not present himself as a sympathetic witness. Furthermore, the state court determined that the counsel's cross-examination of the state's key witness was not affected by the fact that counsel had attended the same high school. Finally, the court found that the defense counsel had good cause for not objecting to the state's challenge of certain veniremen, and that counsel made a reasonable investigation of certain extraneous evidence admitted during the punishment phase of the trial. In short, the state court found against Graham on every issue of fact upon which he predicated his ineffective counsel claim and concluded that counsel had competently and effectively represented Graham.

Having reviewed the record and the state court's findings of fact, we must conclude that Graham has failed to overcome the presumption that the state court's findings were correct. *See Sumner v. Mata*, 101 S.Ct. at 771.

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[12] Graham's prior psychiatric evaluations were consistent and showed that Graham was competent to stand trial. This comported with defense counsel's own view of his client's competency.

Graham has failed to present a meritorious challenge on this issue.

F.

In Graham's sixth point of error, he makes a broadside attack on the Texas death penalty statute, alleging that it violates the fourth, fifth, sixth, eighth and fourteenth amendments to the Constitution. In particular, Graham maintains that the Texas capital punishment system produces arbitrary results and does not provide proportionality. This contention lacks merit in view of the Supreme Court's holdings in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In *Franklin*, although the issue of proportionality was not directly before the Court, Justice White did note that the Texas capital sentencing scheme properly structured jury discretion. ___ U.S. at ___, 108 S.Ct. at 2331. The Court more directly addressed this issue in *Jurek* when it stated:

> Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the even-handed, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.

96 S.Ct. at 2958. *See also McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987); *Pulley v.*

Harris, 465 U.S. 37, 104 S.Ct. 871, 879, 79 L.Ed.2d 29 (1984). We therefore reject Graham's contentions.

G.

Graham also asserts for the first time that his due process and equal protection rights were violated because individuals under eighteen-years old were statutorily excluded from the grand and petit jury and, in addition, blacks were substantially and systematically excluded. The state court specifically found that the peremptory challenges against blacks resulted from the veniremen's testimony that they were opposed to the death penalty. Since the state court has reviewed the record and concluded that Graham has failed to build a prima facie case of discrimination in either the grand or petit jury selection, we must concur with the state court's decision. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1722, 90 L.Ed.2d 69 (1986); *see also Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *United States v. Cronn*, 717 F.2d 164, 168 n. 7 (5th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3586, 82 L.Ed.2d 884 (1984).

Finally, we know of no case law which suggests that exclusion of eighteen-year-olds is unconstitutional, and Graham has failed to show how such an exclusion has denied him a fair jury trial. *See Carter v. Jury Commission*, 396 U.S. 320, 90 S.Ct. 518, 525, 24 L.Ed.2d 549 (1970).[13]

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[13] As a last point of contention, Graham objects to the federal district court's summary dismissal of his claim. He

(Continued on following page)

III

In conclusion, the petitioner has not made a substantial showing of a denial of a federal right and we therefore must deny his petition for a certificate of probable cause.

However, because the Supreme Court has granted certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988) and *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), we will continue our stay until 12:01 a.m., September 30, 1988, in order to give Graham an opportunity to petition the Supreme Court for certiorari; and, if a petition is filed, this stay shall continue in effect until such time as the Supreme Court has acted.

PETITION FOR CERTIFICATE OF PROBABLE CAUSE DENIED.

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argues that the district court conducted an ex parte investigation without giving him the opportunity to file an answer. Finally, Graham alleges that the district court did not provide him an opportunity to inspect and review all documents that it considered. He contends that these omissions violated 28 U.S.C. § 2254, Rules 4 and 5. These assertions are hollow. Rules 4 and 5 do not bind the district courts in such a manner. In any event, Graham has not shown any prejudice arising from these alleged deprivations.

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director Texas Depart. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

March 7, 1990.

Appeal from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before REAVLEY, KING and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

We have been directed to revisit this case by the Supreme Court, which vacated our prior decision, reported at 854 F.2d 715, and remanded for further consideration in light of *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The narrow issue we reach on remand is whether under the Texas capital sentencing system a jury is able to consider and give effect to youth as a mitigating factor without special instructions. We conclude that a jury is unable to do so and therefore vacate Graham's capital sentence.

I.

In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion.

II.

B.

Capital punishment jurisprudence has progressively refined the constitutional boundaries within which a sentencing jury may impose the death penalty. The general contours of those limits permit imposing a sentence of death only when the crime involves statutorily enumerated aggravating circumstances and after a jury has been able to consider and to give effect to any mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104, 110-12, 102 S.Ct. 869, 874-75, 71 L.Ed.2d 1 (1982); *Gregg v. Georgia*, 428 U.S. 153, 195-97, 96 S.Ct. 2909, 2935-36, 49 L.Ed.2d 859 (1976). This structure limits the imposition of the death penalty to egregious circumstances and meets the Eighth Amendment requirement of "an individualized assessment of the appropriateness of the death penalty." *Penry*, 109 S.Ct. at 2946.

In *Jurek v. Texas*, 428 U.S. 262, 276-77, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), the Supreme Count upheld

the Texas capital sentencing system against broad constitutional attacks. However, in *Penry*, the Court narrowed the circumstances in which the Texas statute meets the requirements of the Eighth and Fourteenth Amendments. *See Penry*, 109 S.Ct. at 2947-52.

Under the Texas system, a jury sentencing a defendant found guilty of murder under aggravated circumstances must answer the following questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Code Crim.Proc.Ann. art. 37.07(b) (Vernon Supp.1990). If the jury unanimously answers "yes" to each question submitted, the trial court must sentence the defendant to death. *Id.* art. 37.071(c)-(e). If any question is answered in the negative, the defendant receives a life sentence. *Id.* art 37.071(e).

The Texas statute's constitutionality has repeatedly turned on the issue of "whether the enumerated questions allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956. The statute withstood constitutional attack in *Jurek*, because "three

Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question – despite its facial narrowness – so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." *Lockett v. Ohio*, 438 U.S. 586, 607, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978) (quoting *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956 (Stevens, J., plurality)).

In *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court again considered the constitutionality of the Texas system. Franklin claimed his Eighth Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. The case produced a plurality opinion, with Justices O'Connor and Blackmun concurring in the result. Justice White, writing for the plurality, stated that "[i]t is the established Texas practice to permit jury consideration of ' "whatever mitigating circumstances" the defendant might be able to show' in capital sentencing." *Id.* 108 S.Ct. at 2326 (White, J., plurality). He also noted that the only mitigating evidence Franklin offered – his good prison record – could be considered in response to the future dangerousness question. *Id.* at 2329. Justice White further indicated that a state may "channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty," *id.* at 2331,[1] and ultimately

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[1] Chief Justice Rehnquist and Justices White, Scalia, and Kennedy adhered to this view in the *Penry* dissent, penned by Justice Scalia. *See Penry*, 109 S.Ct. at 2967-69.

concluded that the trial court's refusal to issue special instructions did not violate the Eighth Amendment, *see id.* at 2332.

In her concurrence, Justice O'Connor took issue with the plurality's suggestion that a state could restrict a jury's ability to consider mitigating evidence and underscored the importance of allowing the jury to give effect to mitigating evidence that is "relevant to the defendant's character or background or the circumstances of the offense." *Id.* at 2332-33 (O'Connor, J., concurring). However, Justice O'Connor concluded that the Eighth Amendment did not require special instructions in that case because the evidence of Franklin's good prison disciplinary record could be considered and given effect in answers to the question of future dangerousness. *Id.* at 2333.

The *Penry* Court, however, did find that the statute could be unconstitutionally applied in some circumstances. Like Franklin, Penry had argued that his Eighth Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. However, Penry had offered evidence of his mental retardation and abused childhood as factors mitigating against the imposition of the death penalty, rather than simply a good prison record. *Penry*, 109 S.Ct. at 2952. The distinction between *Franklin* and *Penry* rested upon the relevance of Penry's evidence to his background and its reflection on his moral culpability.

Justice O'Connor, writing for the majority, stressed that "the punishment should be directly related to the

personal culpability of the defendant. . . . " *Id.* at 2951.[2] The Eighth Amendment requires consideration of a capital defendant's background and character " 'because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Id.* at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). In examining the statutory questions that the jury must consider in returning a verdict for death, she found that the jury had insufficient latitude to express its findings regarding culpability. With respect to the first question. Justice O'Connor noted that while the jury was able to consider Penry's mental retardation and abused childhood in answering the questions regarding deliberateness, "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Id.* 109 S.Ct. at 2949. Thus the mitigating effects of mental retardation and an abused childhood could not be given full effect in response to this question.

With regard to future dangerousness, the evidence of Penry's mental retardation and abused childhood was viewed as a "two-edged sword." *Id.* One effect of mental retardation is the inability to learn from one's mistakes. Although retardation may diminish blameworthiness, it also makes it more likely that a retarded defendant will be dangerous in the future. A juror could have found

[2] The majority with regard to this issue was comprised of Justices O'Connor and Blackmun and the three *Franklin* dissenters, Justices Stevens, Brennan, and Marshall.

both that Penry posed a future danger and that he was less culpable than a person with average intelligence. However, the question provides no vehicle for expressing the finding of reduced culpability. *Id.* The Court also found that the third question provided an inadequate alternative for addressing reduced culpability. *Id.* at 2950. Accordingly, because the evidence was relevant beyond the scope of the special issues, the Court concluded that the statutory questions did not adequately provide the jurors with an opportunity to give a "reasoned moral response" to that evidence. *Id.* at 2952.

We understand the Court's rule after *Penry* to be this: a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence. However, in the *Franklin-Penry* aftermath, we are left with the task of determining which type of evidence mandates special instruction.[3] At the outset

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[3] The Supreme Court has assumed that additional instructions could answer the problem, perhaps by broadly defining "deliberately" in the first jury question. *See Penry*, 109 S.Ct. 2949 and *Jurek*, 96 S.Ct. at 2956 n. 7. We have great difficulty with that assumption and believe it to be necessary to submit another question in order that the jury might give effect to all mitigating factors. *See State v. Wagner*, 309 Or. 5, 28-29, 786 P.2d 93, 106-07 (1990) (en banc) (indicating that Oregon courts are constitutionally required to add a fourth question under a statutory scheme similar to that of Texas). If the jury decides that the defendant, after careful consideration, fully intended to take the life of his victim, how can "deliberately" be

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we note that no procedural bar objection has been raised and that the case has been presented for a decision on the merits. Additionally, although Graham's counsel did not request an additional instruction at trial, such a request is not an element of a *Penry* claim. *Mayo v. Lynaugh*, 893 F.2d 683, 688-90 (5th Cir.1990) (suggestion for rehearing en banc pending).

The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree.

Graham was seventeen years old at the time that the murder was committed. His stepfather, Joe Samby, and his grandmother, Erma Chron, testified on his behalf.

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"defined" to require a negative answer to the inquiry where the jury also decides that an abused and retarded adolescent should not be put to death for his wrong – even though it was certainly committed "deliberately"? The requested issues in *Franklin* are set forth at 108 S.Ct. 2324 n. 4. The Jury would certainly be confused by instructions that seem to be allowing a "no" answer even when the question itself calls for a "yes" answer. And if the instruction should be given, modifying the plain meaning of the question, and if the jury answers "yes," how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question that was asked?

Samby testified that Graham, who lived and worked with his father, would visit his mother once or twice a week and would help with chores around the house. He also testified that Graham loved his mother, who was currently on medication and was a "nervous type."

Chron testified that Graham began staying with her intermittently, beginning at the age of three, because his mother was hospitalized "at least twenty" times for a nervous condition that Chron classified as mental illness. Graham then went to live with his father at the age of eleven or twelve. Chron further testified that while Graham was living with her, he went to church and school, was never violent, never possessed weapons, and never gave her any problems.

Age has long been considered "one of the individualized mitigating factors that sentencers must be permitted to consider. . . . " *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see Eddings*, 455 U.S. at 115-16, 102 S.Ct. at 877; *Jurek*, 428 U.S. at 272-73, 96 S.Ct. at 2956-57; *Gregg*, 428 U.S. at 197, 96 S.Ct. at 2936. A jury also must be able to give effect to "evidence of a turbulent family history" in the capital sentencing of a minor. *Eddings*, 455 U.S. at 115-17, 102 S.Ct. at 877-78.

Moreover, age reflects on moral culpability. In *Thompson v. Oklahoma*, the Court restated "the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988) (Stevens J., plurality); *see id.* at 2708 (O'Connor, J., concurring in the judgment)

("Granting the plurality's other premise – that adolescents are generally less blameworthy than adults who commit similar crimes. . . . "). This conclusion is premised on the notion that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 2699 (Stevens, J., plurality). In sum, "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*

The state argues, however, that Graham was not entitled to a special instruction because the evidence of youth and a difficult home life is not relevant beyond the scope of the statutory questions. The state points out that the relevant problems of adolescents – limited abilities to control impulsive behavior, to evaluate the future consequences of their actions, and to appreciate the possibility and finality of death – can be considered in answering the deliberateness question. That, however, does not end the matter, because a jury that found Graham had acted deliberately might also find him less culpable than an adult. If so, the jury would be compelled to answer the issue affirmatively, and it would be unable to give full effect to Graham's mitigating evidence. *See Penry*, 109 S.Ct. at 2949.

The state further argues that all of the mitigating qualities associated with adolescence are squarely addressed by the future dangerousness question. The

state notes that any limitations attributable to adolescence are necessarily transitory. It then argues that a juror finding Graham's moral culpability reduced as a result of his youth could have given effect to the evidence by finding that he did not present a danger in the future. This argument, however, ignores the possibility that a juror could find Graham likely to be dangerous in the future but could also conclude that he was less culpable as an adolescent. If so, that juror could not give effect to the finding of reduced culpability in answering the question.[4] The point of *Penry* is not that a special instruction is unnecessary if a jury could give *some* effect to relevant evidence through the statutory questions; rather, a special instruction is required if a jury cannot give *full* effect to that evidence.

The dissent argues that the mitigating value of youth, without more, is fully covered by the two issues of the Texas verdict. Accordingly, he believes that a special instruction was unnecessary because Graham did not argue that his youth was relevant to any issue other than his future dangerousness and because he did not suggest that his crime was in any way attributable to his youth or to any characteristic associated with his youth.

This view is too restrictive. Adolescence alone is a possible mitigating factor against a sentence of death. The jury was entitled to draw on its common experience and consider the mitigating effect of Graham's youth. A juror

[4] The third question was not presented to the jury.

who concluded that Graham deliberately committed murder and posted a future danger but who also concluded that a punishment of death was less justified for him because of his age was not able to give effect to that judgment. Without special instruction under these circumstances, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 2952.[5]

The state further contends that even if an instruction was erroneously omitted, that error was harmless. We can not accept that argument. The risk that a defendant will be sentenced to death in spite of factors that "may call for a less severe penalty" is incompatible with principles of the Eighth and the Fourteenth Amendments. *Lockett*, 438 U.S. at 605, 98 S.Ct. at 2965.

The district court's judgment is reversed, and the death sentence is vacated. The cause is remanded to the district court for further orders.

E. GRADY JOLLY, Circuit Judge, dissenting:

I respectfully dissent from the majority's effectively setting aside the death penalty in this case on grounds of what amounts to the failure of the trial judge, sua sponte, specifically to instruct the jury that it was free to grant

[5] The dissent understands our ruling to mean that "the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth." However, it is precisely because Graham's youth reflects upon his moral culpability that we believe the Eighth Amendment mandates a jury instruction.

mercy solely because of the defendant's youth at the time of the offense.

With respect to Gary Graham's youth as a sentencing factor, the jury was presented with nothing more than the fact that he was seventeen years old at the time he committed the offense. That isolated fact, without further development, does not furnish a base upon which a reasonable juror could rationally conclude that Graham bears less moral culpability than other citizens. *See Kelly v. Lynaugh*, 862 F.2d 1126, 1133 n. 12 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3263, 106 L.Ed.2d 608 (1989).

I do not dispute that age at the time of the offense can be a relevant mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). The reason that youth can be a relevant mitigating factor is the "recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults." *Eddings*, 102 S.Ct. at 877 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979)). Youth can mitigate against imposition of the death penalty because a juror could conclude that a defendant who commits a criminal act *attributable to that defendant's youth* is less culpable than a defendant who has no such excuse, and that such a defendant should not receive the ultimate penalty. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).

As presented in this case, Graham's youth presented no mitigating factor beyond the scope of the special

issues. Graham's youth is obviously relevant to the first and second special issues of the Texas statute. In his argument to this court, Graham does not indicate how such evidence had relevance beyond the scope of the special issues. Moreover, during the sentencing phase of his trial, he introduced no evidence that would support such additional relevance. Specifically, Graham's counsel only urged the sentencing jury to consider his youth in deciding the answer to special issue no. 2, whether Graham was likely to pose a continuing threat to society. *See Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989) (Texas statute constitutionally applied when mitigating evidence specifically proffered in context of special issues).

Nor did Graham introduce any evidence to suggest that the murder he committed was in any way attributable to his youth. Furthermore, in his closing argument during the sentencing phase of the trial, Graham's counsel did not even argue that Graham's crimes were attributable to his youth:

> Gary Graham 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face[s]. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days?. Drugs? Alcohol? Maybe. Life? Maybe.

In my view, no special instruction is necessary unless there is at least some evidence or argument from which a juror could reasonably conclude that a defendant who commits a criminal act attributable to that defendant's youth is less culpable than a defendant who has no such excuse. *See Penry*, 109 S.Ct. at 2947 (quoting *California v.*

Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)).

Nevertheless, if a juror, even in the absence of any evidence or argument suggesting as much, were convinced that Graham's moral culpability was somehow reduced because his crime was in some unspecified way attributable to his youth, that juror would surely reason that because youth is by nature a transitory condition, Graham would cease to act violently when he outgrew his adolescence. Such a juror would have been able to give full mitigating effect to the fact of Graham's youth by giving a negative answer to the future dangerousness inquiry of the second special issue.

Furthermore, Graham presented no evidence regarding psychological characteristics of his adolescence and their effects on his perceptions and behavior, and points to no such effects in his arguments to this court. Unlike Penry, Graham has made no attempt to relate these factors to his own situation. Here, if a juror believed, even in the absence of any evidence to support such a belief, that Graham, because of his youth, had a limited ability to control impulsive behavior, evaluate the future consequences of his conduct, and appreciate the possibility and finality of death, that juror was free to give a negative answer to the first special issue as well, whether the defendant acted deliberately and with the reasonable expectation that death would result.

Therefore, in my view, the jury was able, without the need for any special instructions, to take into account all of the characteristics associated with Graham's youth, and give that mitigating evidence full effect in answering

the first and second special issues under the Texas statute.

The question is whether the jury instructions provide the jury with a vehicle for expressing a "reasoned moral response" to the mitigating evidence introduced by the defendant. *Penry*, 109 S.Ct. at 2952 (emphasis added). The majority fails to identify in the case before us and on the evidence before us how the jury was unable to make a *reasoned* moral response to the isolated and undeveloped fact of Graham's youth. The majority acknowledges that youth is relevant to the first and second special issues, but believes that the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth. In my view, such a response by the jury in this case, where there is no evidence or argument that Graham's crime was attributable to his youth or that any characteristics of his youth have relevance to his personal or moral culpability beyond the scope of the statutory issues, would not be a *reasoned* moral response, but an *unreasoned* response. I cannot agree with the majority that the defendant has a constitutional right to such unbridled jury discretion. The evidence before the jury simply offered no basis upon which a *reasoned* moral judgment would excuse the death penalty in this case.

Finally, the majority's formulation of the *Penry* rule omits any reference to the Supreme Court's statement that the jury must, *upon request*, be given instructions that allow the jury to give effect to evidence about the defendant's character, background, or the circumstances of the crime that is relevant to the defendant's moral culpability beyond the scope of the special issues. *Penry*, 109 S.Ct. at

2945. Graham's counsel did not object to the jury instructions that were given, nor did he request any additional instructions or a fourth special issue. In my view, a request for instructions is an integral part of a *Penry* claim. *Cf. Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1989) (Suggestion for rehearing en banc pending) "Mayo's counsel satisfied the prerequisites of the claim by offering mitigating evidence at the sentencing phase.").

For the foregoing reasons, I believe that Graham's sentencing jury was fully able to give a "reasoned moral response" to the fact of Graham's youth when it answered the special issues of the Texas statute. Because I believe that the Texas statute was constitutionally applied to Graham, I respectfully dissent.

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Crim. Justice, Institutional Div., Respondent-Appellee.

No. 88-2168.

United States Court of Appeals,
Fifth Circuit.

June 4, 1990.

Appeal from the United States District Court for the Southern District of Texas; David Hittner, District Judge. Presiding.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 7, 1990, 5 Cir., 1990, 896 F.2d 893)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this case shall be reheard by the Court en banc with oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals,
Fifth Circuit.

Jan. 3, 1992.

Appeal from the United States District Court for the Southern District of Texas.

On Remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

A panel of this Court previously affirmed the district court's denial of Gary Graham's habeas corpus petition challenging his Texas capital murder conviction and death sentence. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir.1988). Thereafter, the United States Supreme Court, in *Graham v. Lynaugh*, 492 U.S. 915, 109 S.Ct. 3237, 106 L.Ed.2d 585 (1989), issued a per curiam order that granted Graham's petition for writ of certiorari, vacated

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* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

the judgment of this Court, and remanded the case to this Court "for further consideration in light of *Penry v. Lynaugh*," 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Pursuant to that remand order, a panel of this Court reconsidered the case, and, by a divided vote, vacated Graham's death sentence, the panel majority determining that the Texas capital sentencing system was unconstitutionally applied in Graham's case because the jury at the sentencing phase of his trial, having been given no special instructions, was not able to adequately consider and give effect to Graham's youth as a mitigating factor. *Graham v. Collins*, 896 F.2d 893 (5th Cir.1990). Having ordered rehearing en banc, *Id.* 903 F.2d 1014 (5th Cir.1990), we have again reconsidered the case in light of *Penry* and, disagreeing with the panel majority's determination in this respect, we now reinstate our former affirmance of the district court's denial of habeas relief.

Procedural History

Over his plea of not guilty, Graham was convicted by a Texas court jury in October 1981 of the offense of capital murder, the May 1981 intentional killing of Bobby Lambert by shooting him with a pistol while in the course of robbing or attempting to rob him. Texas Penal Code, art. 19.03(a)(2). At the sentencing phase of the trial, the jury answered in the affirmative each of the three special issues provided for in Texas Code of Criminal Procedure, art. 37.071(b), and Graham was accordingly sentenced to

death.[1] On direct appeal, Graham's conviction and sentence were affirmed by the Texas Court of Criminal

[1] The 1988 and 1990 panel opinions in this case erroneously indicated that only the first two issues specified in art. 37.071(b) were submitted. *See, id.*, 896 F.2d at 898 n.4 and 854 F.2d at 718.

Until 1991, sections (a) through (e) of art. 37.071 provided, as they did also in 1981, as follows:

> "(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> "(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
>
> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence

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Appeals in an unpublished opinion. Graham subsequently sought habeas corpus relief in the Texas courts.

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> that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> "(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.
>
> "(d) The court shall charge the jury that:
>
> "(1) it may not answer any issue 'yes' unless it agrees unanimously; and
>
> "(2) it may not answer any issue 'no' unless 10 or more jurors agree.
>
> "(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life."

The above provisions are the same as when the statute was first enacted in 1973 (except that by 1981) amendment the word "three" was inserted in the opening clause of section (b)).

In May 1991 the Texas Legislature passed two bills amending art. 37.071. S.B. 880, ch. 838, 72nd Leg., R.S. 1991,

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After holding an evidentiary hearing on Graham's allegations, the convicting trial court recommended denial of

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extensively amends the Texas capital sentencing procedure, including art 37.071, and specifies an effective date of September 1, 1991, but is expressly made applicable "only" to offenses "committed on or after September 1, 1991." S.B. 880, § 5. The changes made by S.B. 880 § 1 to art. 37.071 include the entire elimination of the former first and third special issues (the former second special issue is retained verbatim in all cases), provision for a new special issue where the jury charge allowed the defendant to be found guilty under the law of parties, and provision in all cases for the following new special issue:

> "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed."

If all issues submitted are answered adversely to the defendant, the sentence is death; otherwise, the sentence is life imprisonment. S.B. 880 was finally passed May 17, 1991, and was filed without the Governor's signature on June 16, 1991. The other bill, H.B. 9, ch. 652, 72nd Leg., R.S. 1991, was finally passed May 27, 1991, and was signed by the Governor June 16, 1991. Section 9 of H.B. 9 provides that art. 37.071 "is amended to read as follows" setting it out in full in the *same* form as it existed previously (or before May 1991) with only minor, technical changes (a new section 1 is added providing that the judge shall sentence the defendant to life imprisonment if the state does not seek the death penalty; the remainder of art. 37.071 is put in to its section 2, stated to apply only if the state seeks the death penalty; the only other changes are from

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relief, transmitting to the Court of Criminal Appeals findings and conclusions rejecting Graham's contentions. The Court of Criminal Appeals thereafter denied relief pursuant to an unpublished opinion.

Graham then brought the present proceedings under 28 U.S.C. § 2254 in the district court. That court denied relief without an evidentiary hearing, and denied stay of execution and a certificate of probable cause. A panel of this Court granted an interim stay, but ultimately denied Graham's application for certificate of probable cause. *Graham*, 854 F.2d 715. Judge Jolly, in his opinion for the panel consisting of himself and Judges Reavley and King, considered and rejected seriatim each of Graham's several claims. In part IIB of the opinion, the panel dealt with Graham's contention that the Texas statutory special issues, which mandate the death penalty if all are answered affirmatively, *see* note 1, *supra*, do not permit the jury to adequately weigh mitigating circumstances when formulating their answers. *Id.* at 718-20. The factors Graham relied on as mitigating were primarily his youth – he was seventeen at the time of the offense – and certain

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"upon" to "on" at the beginning of section 2(a) and using the current designation for the former Texas Department of Corrections in section 2(e)). H.B. 9 specifies September 1, 1991 as its effective date (section 16), and its section 15(a) states: "(a) the changes in law made by Section 1-9 and 11, 12, and 13 of this Act apply to the trial of a capital offense that commences on or after the effective date of this Act, whether the trial is for an offense committed before, on, or after the effective date."

We merely note these 1991 enactments, and express no opinion with respect to whether, for offenses committed on or after September 1, 1991, the controlling form of art. 37.071 is as provided in S.B. 880 § 1 or H.B. 9, § 9.

matters reflected by evidence concerning his childhood.[2] *Id.* The panel relied particularly upon *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), and concluded by holding that "the jury's verdict . . . is consistent with the constitutional requirements outlined in *Franklin* and other precedents." *Id.* at 719.[3]

Following the Supreme Court's remand for reconsideration in light of *Penry*, the panel again grappled with this difficult issue.[4] Judge Reavley, for the panel majority, held that:

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[2] The panel also, among other things, rejected Graham's contention that the Eighth Amendment prohibited execution for an offense committed when the defendant was less than eighteen years old. *Id.* 854 F.2d at 717-718.

[3] The 1988 panel did, however, observe (*id.* at 720, n.8):

> "We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, [487] U.S. [1233], 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925."

[4] With respect to the other issues in the case, the 1990 panel opinion observed:

> "In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is

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> "The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree." *Id.* at 897.[5]

Judge Jolly, in his 1990 dissent, concluded that the second special issue adequately encompassed any mitigating aspects of youth that the jury must constitutionally be free to consider, as Graham's youthfulness was such a factor only to the extent his offense was a product of it, and youth was necessarily a transitory condition that the jury could fully take into account "by giving a negative answer to the future dangerousness inquiry of the second special issue." *Id.* at 899.

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> discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion." *Id.* 896 F.2d at 894.

We agree, and reinstate this portion of the 1990 panel opinion. For the same reason, we similarly deny relief with respect to Graham's contentions addressed in footnotes 5, 7, and 9 of the 1988 panel opinion. *Id.* 854 F.2d at 718 n. 5, 719 nn. 7 & 9.

[5] The 1990 panel majority, though summarizing the evidence presented by Graham respecting his childhood, *id.*, did not address whether that evidence, of itself, would have required some further instruction or jury submission beyond that given. As to the *Penry* issue, the panel only addressed "Graham's age."

Context Facts

At the guilt-innocence phase of the trial, Graham's defense was essentially only one of insufficient identification. The state presented several witnesses to the shooting, which occurred at about 9:30 p.m. on Wednesday, May 13, 1981, in the parking lot of a Safeway Food Store in Houston, Texas. The perpetrator, a man wearing black pants and a white jacket, bumped into Lambert, who was carrying a sack of groceries out of the store, and attempted to grab Lambert's wallet. Some of the testimony indicated that there was a brief struggle between the two. Lambert pushed at the perpetrator, and each steeped back; the perpetrator produced a pistol, leveled it at Lambert's chest, and shot him in the heart from a distance of about two to three feet. The perpetrator then fled without being apprehended. Lambert staggered back toward the store, fell, and died on the spot. The perpetrator had been observed in the store when Lambert was there, but had left a few minutes before Lambert did. So far as the evidence showed, the perpetrator acted alone. Only one of the witnesses, Mrs. Skillern, was able to identify Graham as the perpetrator.[6] She ultimately so identified Graham in a May 26 photographic display and in a May 27 police station "line up," as well as in her open court trial testimony. Defense counsel attacked Mrs.

[6] The other witnesses did not testify to anything suggesting that Graham was not (or did not resemble) the perpetrator, but merely stated that they did not get a good enough look at (or sufficiently recall) the perpetrator's face to make an identification.

Skillern's identification, both by vigorous cross-examination and by emphasizing in argument the failure of the other witnesses, at least one of whom was closer to the events in question, to make an identification.[7] However, no defense evidence was presented. In closing argument defense counsel did not suggest that the evidence failed to show that the offense charged had been committed, but rather that it failed to show that Graham was the one who committed it.

At the sentencing hearing, no evidence was introduced concerning the offense of conviction. The state introduced extensive evidence showing that on five different days during the week following his murder of Lambert, Graham committed robberies at a total of nine separate locations and in each instance Graham leveled either a pistol or a sawed-off shotgun on the victim. The first of these was on May 14, and the last on May 20. These offenses involved some thirteen different victims, including women aged fifty-seven and eighteen and men aged sixty-four, fifty-seven, eighteen, and other ages. With respect to a few of these occasions, the evidence indicated Graham was using marihuana. In addition to money and personal effects, five vehicles were stolen. Two of the victims were pistol whipped, one of them being shot in the neck. These were the only serious physical injuries. Graham glancingly struck another victim, the sixty-four-year-old man, with the vehicle he was stealing,

[7] The defense also sought to suppress Mrs. Skillern's testimony on the basis that the photographic display and line-up were unduly suggestive. After an extensive hearing out of the presence of the jury, this motion was overruled.

apparently trying to run over him. The fifty-seven-year-old woman was kidnapped and raped, after which Graham fell asleep in her apartment, she contacted the police and he was arrested there, thus bringing his crime spree to an end. On five of these occasions Graham apparently acted alone; on four others an accomplice (not shown to be of a different age from Graham) was present or nearby, but Graham wielded the weapon. At least six of the separate incidents, including that with the sixty-four year old and the two with the fifty-seven year olds, involved Graham practicing initial successful deception on the victim. The state also introduced testimony of a Texas Youth Council employee that she had been familiar since an unspecified time in 1989 with Graham's reputation in the community for being a peaceful and law-abiding citizen, and that it was bad; she gave no elaboration or specifics whatever and did not state how she acquired this information, except that it was not based on her own personal observation. This was the entirety of the state's evidence at the punishment stage.

The only evidence presented by the defense at the sentencing stage consisted of the testimony of Graham's stepfather, Joe Samby, and his grandmother, Erma Chron. Samby testified that he had been married to Graham's mother for about five years, and had known Graham for about five years. He said Graham was fifteen when he (Samby) first met him. Graham lived with his father, and worked with him, but Samby did not know what kind of work Graham did. Graham would come by Samby's house once or twice a week to visit his mother. Graham had "real, real respect for his mother. He cared about his mother. He was real close to his mama." His mother was

present in the courtroom, but Samby explained "she can't do nothing because she is on medication and nervous. She is the nervous type." Samby stated that he had never known Graham to be a violent person, that Graham had been "real nice, respectable" with him and, when requested to help out around Samby's house, such as by cutting the grass or to "clean up and help his mother," Graham "would do it and be glad to do it for me." Graham was one of four brothers, and had no sisters. Samby had three children of his own living in his house. Graham had two children, one four and the other two. Graham would "buy . . . clothes for his children and try to give them food."[8]

Chron testified that her grandson Graham began staying with her intermittently, beginning "when he was around three," because his mother was frequently hospitalized for a "nervous condition" that Chron said was "mental illness." He would stay with his mother when she was not hospitalized. However, at about age eleven or twelve, Graham went to live with his father and "he has been with his father ever since." Graham's mother had been hospitalized "at least twenty times." Chron further stated that while Graham was living with her he attended school, "he would go to church all the time and everything. He loved the Lord," and he didn't give Chron "any problems or trouble." Chron also testified that Graham never had any weapons, and "he has never been violent."

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[8] There was no evidence as to where Graham's children lived or whether Graham was or had been married.

Apart from Samby's testimony that he had known Graham about five years and first knew him when Graham was fifteen, which would indicate that Graham was nineteen or twenty when the offense was committed, there was no evidence before the jury as to Graham's age.[9] Nevertheless, each of Graham's two attorneys, in their closing arguments at the punishment stage, argued to the jury, without prosecution objection, that Graham was seventeen when his offense was committed.

The first defense counsel's argument included the following:

> "We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out

[9] However, it is undisputed that Graham was in fact born on September 5, 1963, this being reflected in a report of a pretrial psychiatric examination filed in the papers of the case in August 1981, the examination having been ordered by the court on motion of defense counsel. Graham was thus seventeen years and eight months of age when the offense was committed. Records of the late May 1981 line-ups at which Graham was identified, which were not before the jury but were put in evidence only in hearings out of the presence of the jury on suppression motions, also reflect that Graham was seventeen at that time.

> of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own. . . . Gary Graham is a young man. No doubt about it. . . . A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 days. 7 days out of his life. He is not going to ever forget. . . . I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given that opportunity. . . . Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their fact. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe. . . . "

Graham's other counsel argued in a similar vein, stating:

> " . . . there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish. . . . We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when

you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think., but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. . . . because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. . . . "

The prosecution's argument did not refer to Graham's age in any way except to once acknowledge "his youth." The prosecution stressed Graham's killing of Lambert and his other many serious offenses in the following week, stating in part:

"Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. . . . [T]here are certain individuals in our society that we have got to look at. And we

have got to realize that are not fit to live with us. The evidence beyond a reasonable doubt shows that Gary Graham is not fit to live in this society, that he will constitute a continuing threat to society. Compassion? They ask for compassion. We ask you for his life. . . . Rights of the individuals of this society. The life of Bobby Grant Lambert. They say look at his youth. When does a human life taken the way he took that life of Bobby Grant Lambert cease to have meaning? It ceases to have meaning when the terror and the degradation of a man such as him holds the life in his hand. . . . Compassion? Care? Have you just looked at him? . . . Death is the only protection that you, as the jury, and society can protect from people and especially Gary Graham. The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? And where has he sowed those seeds? In the fertile earth? No. He buried Bobby Grant Lambert in the earth. His seeds are death. Pain, Suffering. Humiliation. Degradation. What do those things bring? But one thing tell you what Gary Graham is. You have seen his actions. You have heard from the mouths of these people. Deliberate conduct. . . . "

Neither side made any objections to the other's argument. The court instructed the jury in accordance with article 37.071, including informing them that the sentence would be either "death or confinement in the penitentiary for life," and that in answering the three special issues they could take into consideration all the evidence submitted both at the guilt-innocence stage and at the

punishment stage.[10] The three special issues called for by art. 37.071(b) were submitted, and each was answered in the affirmative. Neither side objected to the charge or the issues submitted or requested any other or further instructions or issues.[11]

DISCUSSION

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court sustained the

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[10] The jury was also instructed that the state still had the burden of proof, which never shifted to the defendant, and that "each special issue submitted must be proved by the state beyond a reasonable doubt" and none could be answered "yes" unless all jurors were convinced beyond a reasonable doubt that it should be so answered.

[11] Prior to trial, the court had denied defense counsel's motion to "hold article 37.071 . . . unconstitutional and void." This motion was grounded on the contention that the special issues called for were too "vague and indefinite," and thus "allow total discretion to a jury to make unfavorable findings against a Defendant, and such findings may be based on any prejudice the jury may have, individually or as a whole." The supporting memorandum explained that "Article 37.071 leaves with both the judge and the jury a vas[t] residue of discretion which is precisely what the Supreme Court in *Furman [v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] condemned" and argues that "[c]onsequently, the inquiry [of the article 37.071 issues] is fraught with standardless discretion in the hands of the jury."

There was no suggestion in the motion or memorandum that defendant complained of insufficient discretion (or an insufficient vehicle to give effect to it) to determine that the defendant would not receive the death penalty, or that the jury was not given an adequate basis to consider or give effect to its conclusions concerning defendant's age or background. The complaint was indeed the reverse.

Texas capital sentencing procedure of art. 37.071. This case requires us to examine what, if anything, remains of *Jurek* and art. 37.071 after *Penry*. To provide context for this examination, an overview of some of the other leading decisions of the Supreme Court in this area is appropriate.

Context cases

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Court effectively struck down all capital punishment statutes then in place. The crucial votes in *Furman* were those of Justices Stewart and White, who, as Justice Scalia observed in *Walton v. Arizona*, ___ U.S. ___, 110 S.Ct. 3047, 3061, 111 L.Ed.2d 511 (1990) (concurring opinion), "Focused on the infrequency and seeming randomness" with which the death sentence was imposed under the then existing discretionary system.[12] Following *Furnam* some thirty-five states adopted new capital sentencing statutes that reduced or narrowed the sentencer's discretion in determining whether or not to impose the death penalty. The supreme Court ruled on five of these statutes on July 2, 1976. *Gregg v. Georgia*, 428

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[12] Justice Stewart, for example, observed that of those convicted of capital crimes "many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed" and that the Constitution could not tolerate system that "permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 92 S.Ct. at 2762-63. Justice White observed that under the statutes at issue "there is no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." *Id.* at 2764.

U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek; Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). *Gregg* sustained the Georgia statute, which directed the sentencer to consider listed and unlisted aggravating and mitigating circumstances, but allowed a death sentence only if at least one listed aggravating circumstance were found. The court observed that "Furman mandates" that the capital sentencer's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *id.* 96 S.Ct. at 2932, and warned against sentencing standards "so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Id.* at 2935 n. 46. *Gregg* goes on to note, however, that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk or arbitrariness or caprice." *Id.* at 2939". *Proffitt* applied the *Gregg* rationale to uphold the somewhat similar Florida scheme. *Woodson*, however, struck down the North Carolina statute under which the death penalty was made mandatory for first degree murder, in that case murder during the course of robbery. The Court noted that among the "constitutional short-coming[s]" of this statute was "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant," and that in capital cases the Eighth

Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense." *Id.*, 96 S.Ct. at 2991. *Roberts* applied the same rationale to invalidate the Louisiana statute under which the death penalty was likewise mandatory for first degree murder.

We turn now to *Jurek*, decided the same day. There seven justices voted to uphold the Texas scheme as embodied in art. 37.071, but no opinion attracted more than three votes. The judgment of the Court was announced in Justice Stewart's opinion, which Justices Powell and Stevens joined, and this opinion has generally been understood as expressing the rationale of the Court's action.[13] Justice Stewart's opinion summarizes

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[13] Justice White, in an opinion in which then Chief Justice Burger and then Justice Rehnquist joined, likewise found the Texas statute constitutional. *Id.*, 96 S.Ct. at 2959-60. Justice White's opinion quotes the statutory special issues in full and observes that "[t]he statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *Id.*, at 2959.

Justice White, joined by then chief Justice Burger, Justice Blackmun, and then Justice Rehnquist, dissented in *Roberts*, *id.*, 96 S.Ct. at 3008-3020, and also in *Woodson*. Justice Blackmun wrote a separate dissent in *Woodson* and did not join Justice White's dissent there. *Id.*, 96 S.Ct. at 2992-93. In *Jurek* Justice Blackmun separately concurred in the judgment, with only a brief reference to his *Furman* dissent. *Jurek*, 96 S.Ct. at 2960. Justices Brennan and Marshall dissented in *Jurek*, as well as *Gregg* and *Proffitt*, on the grounds that the death penalty was unconstitutional *per se*. 96 S.Ct. at 2971-2977. They concurred in the result in *Woodson*, *id.*, 96 S.Ct. at 2992, and *Roberts*, *id.*, 96 S.Ct. at 3007, on the same basis.

the facts adduced at trial, including evidence that Jurek "22 years old at the time, had been drinking beer in the afternoon" of the offense, and that he "had always been steadily employed since he had left school and that he contributed to his family's support." *Id.*, 96 S.Ct. at 2954. In describing the Texas sentencing procedure, the opinion states that at the punishment phase the jury is "presented with two (sometimes three) questions, the answers to which determine whether a death sentence will be imposed." *Id.* (footnote omitted). It observes that only the first two issues specified in art. 37.071 were submitted, that both were answered yes, "and the judge, therefore, in accordance with the statute, sentenced the petitioner to death." *Id.* The opinion then quotes verbatim the full text of the three issues specified in art. 37.071, and continues by stating "[i]f the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed." *Id.* at 2955.

In evaluating the constitutionality of the Texas scheme, Justice Stewart notes that under *Woodson and Roberts* "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Id.* at 2956. The opinion then observes that "[t]he Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions," and "[t]hus, the constitutionality of the texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.* The Court proceeds to answer this inquiry in the affirmative, but only with regard to the second – the

future dangerousness – special issue, because "[t]he Texas Court of Criminal Appeals has not yet construed the first and third questions . . . thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry." *Id.* at 2956, n. 7. In turning to the second special issue, the opinion notes that "[t]he Texas Court of Criminal Appeals has yet to define precisely the meaning of such terms as 'criminal acts of violence' or 'continuing threat to society.' " *Id.* at 2956. It goes on to state (96 S.Ct. at 2956-57):

> "In the present case, however, it [the Texas Court of Criminal Appeals] indicated that it will interpret this second question so as *to allow a defendant to bring to the jury's attention* whatever mitigating circumstances he may be able to show:
>
> " 'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age *of the defendant* and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider *whether the defendant was under an extreme form of mental or emotional pressure*, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.' [*Jurek v. State*] 522 S.W.2d [934], at 939-940 [Tex.Crim.App.1975]." (emphasis added).

After briefly considering one other Texas Court of Criminal Appeals decision,[14] Justice Steward's opinion states "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 2957. The opinion concludes by observing:

> "*By authorizing the defense to bring before the jury* at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. . . . Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution. *Id.* at 2958 (emphasis added).

Two years later, in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court considered an Ohio death sentence imposed for the murder of a pawnshop operator in the course of an armed robbery of his shop while the defendant, an accomplice, waited outside in the getaway vehicle. Under Ohio law, as the Court construed it, the sentencing judge was required to impose the death sentence for the offense unless he found, by a preponderance of the evidence, one of the three statutory

[14] The case considered was *Smith v. State*, 540 S.W.2d 693, 696-97 (Tex.Crim.App.1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977), where the Texas court examined the sufficiency of the evidence to support the jury's affirmative answer to the second special issue. *Jurek*, 96 S.Ct. at 2957.

mitigating factors, namely (1) that the victim induced or facilitated the offense, or (2) that the defendant committed the offense under "duress, coercion, or strong provocation," or (3) that it was "primarily the product of" the defendant's "psychosis or mental deficiency." *Id.* 98 S.Ct. at 2959, 2966. "No one planned to kill the pawnshop operator in the course of the robbery." *Id.* at 2957. The presentence report reflected that the defendant, a twenty-one-year-old female, had committed "no major offenses" and that in the opinion of a psychologist her "prognosis for rehabilitation . . . was favorable." *Id.* at 2959. The sentencing judge found that the offense was not the product of psychosis or mental deficiency, did not address the other two statutory mitigating factors, and sentenced the defendant to death, stating "that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Id.* The plurality opinion by Chief Justice Burger, joined by Justices Stewart, Powell and Stevens, held that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is inconsistent with the Eighth and Fourteenth Amendments. . . . a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 2967. The scope of the plurality opinion is unclear. It focuses on the fact that under the Ohio statute the defendant's lack of specific intent to kill "is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors" and that "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." *Id.* at 2966-67. Similarly, the plurality notes that the

Ohio statute's "constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg, Proffitt* and *Jurek*," *id.* at 2965, and "the statute now before us is significantly different" than those statutes. *Id.* 2966. More broadly, however, the opinion states that:

> " . . . a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. . . . that risk is unacceptable and incompatible with the command of the Eighth and Fourteenth Amendments." *Id.*

If the quoted language concerning "independent" mitigating weight is understood in its most apparent literal sense, the *Lockett* plurality would seem to be wholly inconsistent with *Jurek*, for in *Jurek* it is clear that the Supreme Court understood what the Texas statute so obviously facially provides, namely that although a wide range of evidence concerning the defendant's character and record and the circumstances of the offense is to be considered in determining whether or not to impose the death penalty, the consideration of that evidence is not "independent" of such relevance as the jury may find it has to the special issues. But such a construction of *Lockett* is not only much broader than the facts there, but is also at war with the plurality's statement that the Ohio statute was "significantly different" than the Texas enactment and that the former's deficiencies "can best be understood by comparing it with" the valid Texas statute.

Justice Blackmun concurred specially in *Lockett*, "for a reason more limited than that which the plurality espouses" namely that the Constitution forbids imposition of "the death sentence for a defendant who only aided and abetted a murder, without permitting *any* consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Id.* at 2969 (initial emphasis added). Justice Marshall likewise concurred specially, adhering to his view that the death penalty was always unconstitutional, but also observing that the defendant "was sentenced to death for a killing that she did not actually commit or intend to commit" pursuant to "a statutory scheme that precluded *any effective* consideration of her degree of involvement in the crime, her age, or her prospects for rehabilitation." *Id.* at 2972 (emphasis added). Justice White concurred specially, expressly disagreeing with the plurality opinion, but concluding that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." *Id.* at 2983.[15] Then Justice Rehnquist dissented, and Justice Brennan did not participate.

The next significant decision in this context is *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), where the Court struck down a death sentence imposed on a sixteen year old, whom the sentencing

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[15] A modified version of this view subsequently gained majority support. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

judge found posed a continuing threat of violence to society. There, Justice Powell's plurality opinion focused on the fact that the sentencing judge appeared to have determined that "in following the law" he was not permitted to "consider" the defendant's troubled background, the evidence showing the defendant's neglectful and turbulent family environment, excessive physical punishment by his father, that the defendant was emotionally disturbed and his mental and emotional development were at a level several years below his chronological age, and that the offense was a product of these circumstances. *Id.* 102 S.Ct. at 873 & nn. 1 & 2, 877. The opinion also observed that the Oklahoma Court of Criminal Appeals, in reviewing the sentence, had noted that defendant's contention " 'that the killing was in actuality an inevitable product of the way he was raised,' " but held that " 'the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.' " *Id.* at 874. The plurality opinion states that under *Lockett* "the sentencer in capital cases must be permitted to consider any relevant mitigating factor," *id.* at 875, and that "the evidence Eddings offered is relevant mitigating evidence." *Id.* at 877. The rule of *Lockett* was violated because the trial judge "found that *as a matter of law* he was unable even to consider the evidence" and the state appellate court "took the same approach," *id.* at 876, so that "it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf." *Id.* at 877.

Justice O'Connor did not join Justice Powell's opinion, but specially concurred, stating that "the reasoning of the plurality opinion in *Lockett* compels a remand so

that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' " *Eddings*, at 879 (quoting *Lockett*). A remand was necessary for this reason because "it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence." *Id.* Then Chief Justice Burger, joined by Justices White, Blackmun and then Justice Rehnquist, dissented.

In the case *sub judice*, not only was no evidence tendered by the defense excluded, but the trial court's instructions expressly authorized consideration of all evidence admitted in answering the special issues, and, unlike *Eddings*, there is nothing to affirmatively indicate that the jury believed they could not consider any of the evidence for that purpose.

The Court applied *Eddings* in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), to reverse a death sentence because at the sentencing hearing the trial judge had excluded as irrelevant the defense's proffered "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail," and the prosecutor had nevertheless argued to the jury "that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners." *Id.* 106 S.Ct. at 1670. Justice White's opinion for the Court states that under *Eddings* the capital "sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " *Skipper* at 1671 (quoting *Eddings*). Justice White went on to hold:

> "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.' *Jurek v. Texas*, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976). . . . [E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Id.* (footnote omitted).[16]

Justice Powell, with then Chief Justice Burger and then Justice Rehnquist joined, concurred in the result, conceding that reversal was required on due process grounds because the death sentence had been sought on a factual basis the defendant had not been allowed to rebut, but rejecting the notion that *Eddings* and *Lockett* applied. *Id.* at 1673-1675. Justice Powell – author of the *Eddings* plurality – concluded that the States retained authority to "determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance," that these determinations should be respected provided "they do not foreclose consideration

[16] The opinion concludes that because the excluded evidence was the only evidence from disinterested witnesses tending to contradict the prosecutor's argument, "it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence." *Id.* at 1673.

of factors that may tend to reduce the defendant's culpability for his crime," *id.* at 1674, and that "States are only bound to consider those factors that are central to the fundamental justice of execution." *Id.* at 1675. Nothing in Justice White's opinion appears inconsistent with these general premises.[17]

In *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), Justice Scalia, for a unanimous Court, reversed a Florida death sentence where the record "could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* 107 S.Ct. at 1824. The defendant had requested that there be taken into account "the testimony concerning petitioner's family background and his capacity for rehabilitation," matters which were not included in the statutory mitigating circumstances. *Id.* at 1824.[18]

[17] Indeed, Justice White's opinion indicates evidence such as that of good personal hygiene practices while in prison might properly be treated as irrelevant. *Id.* at 1672 n. 2.

[18] The Florida statutory mitigating circumstances as set out in the opinion, *id.* at 1823 n. 3, did not include potential for rehabilitation or lack of future dangerousness or any analogous consideration (nor any general or residual mitigation category). Nor did they include matters such as troubled family history or turbulent upbringing (here, evidence that as a child the twenty-year-old defendant had the habit of inhaling gasoline fumes, as an apparent result of which his mind tended to wander, and that he was one of seven children of a poor family whose father died of cancer), although they did include whether the crime was committed while "under the influence of extreme mental or emotional disturbance" and whether

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The Court held that "the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid," citing *Skipper* and *Eddings*. *Id.*[19]

The next year the Court revisited the Texas statute in *Franklin*, where it found no constitutional error in the refusal of a requested jury instruction that any of the special issues could be answered negatively "if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty." *Id.* 108 S.Ct. at 2325 & n. 4. The only mitigating evidence was that defendant's prison service for several years both before and after the offense was without any disciplinary incident. *Id.* at 2324. Justice White's plurality opinion, joined by the Chief Justice and Justices Scalia and Kennedy, observed that "the Texas courts have expressed resolute adherence to *Lockett*" in the decade since it was decided, *id.* at 2326, and rejected the contention, based on the " 'independent' mitigating weight" language of *Lockett*, that defendant's "prison disciplinary record reflected so positively on his 'character' that the instructions . . . should have provided the jury with a 'mechanism through which to impose a life sentence' even if the jury otherwise believed that both Special Issues should

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defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was "substantially impaired." The opinion contains no discussion whatever of the possible relevance of these latter factors to the "family background" claims of petitioner.

[19] The opinion observes that no harmless error argument was made.

have been answered 'yes.' " *Id.* at 2329. Justice White also expressly rejected the claim that the Constitution required that the jury, even if it answered the special issues affirmatively, be "still entitled to cast an 'independent' vote against the death penalty," stating that "this submission is foreclosed by *Jurek*, which held that Texas could constitutionally impose the death penalty if a jury returned 'yes' answers to the two Special Issues" and that "*Jurek* has not been overruled; and we are not inclined to take any such action now." *Id.* at 2330. The plurality opinion asserts that "*Lockett* does not hold that the state has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors," *id.*, and that "we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused." *Id.* at 2331. Recognizing that "two lines of cases" – *Eddings* and *Lockett* on the one hand and *Gregg* and *Proffitt* on the other –"are somewhat in 'tension' with each other," Justice White notes that nevertheless "the Texas capital sentencing system has been upheld by this Court . . . precisely because of the way in which the Texas scheme accommodates *both* of these concerns." *Id.* He continues by stating:

> "Doubtlessly this is why this Court originally approved Texas' use of Special Issues to guide jury discretion in the sentencing phase, notwithstanding the fact – expressly averted to in the plurality opinion for the Court – that mitigating evidence is employed in the Texas scheme *only* to inform the jury's consideration of the answers to the Special Issue questions." *Id.* (emphasis added).

Justice Stevens, joined by Justices Brennan and Marshall, dissented, concluding the defendant's evidence of freedom from disciplinary violations during several years of imprisonment was relevant as mitigation in respects other than simply as it bore on his future dangerousness. Such evidence indicated "that petitioner's character was not without some redeeming features" and that he "may have virtues that can fairly be balanced against society's interest in killing him in retribution for his violent crimes," *id.* at 2335, and, by suggesting that his commission of the offense was "not in keeping with his . . . usual qualities or fruits," bore on his "culpability" for the offense as well as on his future dangerousness. *Id.* at 2336. Justice Stevens concluded that absent some special instruction such as the defendant had requested "it is probable that the jury misapprehended the significance it could attach to mitigating evidence that was descriptive of petitioner's character rather than predictive of his future behavior." *Id.* at 2337. This in Justice Stevens' view rendered the sentence invalid under *Lockett* and *Eddings* and related cases.

Justice O'Connor, with whom Justice Blackmun joined, specially concurred. *Id.* at 2332-2335. She considered *Lockett*, *Eddings* and *Hitchcock* as standing for the proposition that "punishment should be directly related to the personal culpability of" the defendant, and she concluded that "a state may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty." *Id.* at 2333. In Justice O'Connor's view, the evidence of defendant's good conduct in prison "had

no relevance to any other aspect of petitioner's character" than his future dangerousness. *Id.* Hence, no special instruction was required. Justice O'Connor contracted "[t]he limited probative value" of that particular mitigating evidence to "[e]vidence of voluntary service, kindness to others, or of religious devotion [which] might demonstrate positive character traits that might mitigate against the death penalty." *Id.* Her opinion also states:

> "If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or *that had relevance to the defendant's moral, culpability beyond the scope of the special verdict questions,* the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. If this were such a case, then *we would have to decide whether* the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." *Id.* (emphasis added).

However, Justice O'Connor did not expressly proffer an answer to that question.

Penry

At long last, we turn to the crucial decision in *Penry*. There the evidence showed that the defendant, 22 years old and on parole from a prior rape conviction at the time of the charged offense, "suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and in inability to learn from experience." *Id.* 109 S.Ct. at 2941. The brain damage was likely

present from birth, "but may have been caused by beatings and multiple injuries to the brain at an early age." *Id.* Penry's mother had "frequently beaten him over the head with a belt when he was a child," and he was "routinely locked in his room without access to a toilet for long periods of time." He "was unable to learn in school and never finished the first grade." Until age twelve, Penry "was in and out of a number of state schools and hospitals." *Id.* Thereafter, it took him over a year to learn to print his name. *Id.* at 2942. The two psychiatrists testifying for the State both opined that Penry was sane, but they also acknowledged his "extremely limited mental ability, and that he seemed unable to learn from his mistakes," one indicating that Penry had "an inability to learn from experience and a tendency to be impulsive and to violate society's norms." *Id.* Defense counsel unsuccessfully objected to the sentencing charge on several grounds, including its failure to define "deliberately" as used in the first special issue, its failure to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances," and its failure to condition a death sentence on a determination "that any aggravating circumstances . . . outweigh any mitigating circumstances." *Id.* At sentencing, defense counsel argued, among other things,

> "that if a juror believed that Penry, because of the mitigating evidence of his mental retardation and abused background, did not deserve to be put to death, the juror should vote 'no' on one of the special issues even if it believed the State had proved that the answer should be 'yes.' " *Id.* at 2950.

In response, the prosecutor noted that the defense counsel had not argued the special issues or shown how the state had failed to meet its burden of proof on them.

The court, in an opinion by Justice O'Connor, joined in this respect by Justices Brennan, Marshall, Blackmun and Stevens, set aside the death sentence, concluding:

> "In light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.*[20]

Justice O'Connor first determined that the rule Penry sought to establish – that where evidence of the defendant's "mental retardation and abused childhood . . . is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence" – was not a " 'new rule' " for purposes of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), "because it is dictated by *Eddings* and *Lockett*."

Penry at 2947. The opinion goes on to explain that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. the sentencer must also be able to consider and give effect that that evidence in imposing sentence." *Id.* at 2947. Quoting her concurring opinion in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934

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[20] Justice Scalia, joined by the Chief Justice and Justices White and Kennedy, dissented from this holding. *Id.* at 2963-68.

(1987), Justice O'Connor states that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" and that a capital sentence " 'should reflect a reasoned moral response to the defendant's background, character, and crime.' " *Penry* at 2947. Penry's contention is again described as being that the Texas statute was applied in a manner "precluding the jury from acting upon the particular mitigating evidence he introduced." *Id.* Yet again, his claim is characterized as follows:

> "Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence." *Id.*

The opinion goes on to explain this conclusion. Respecting the first special issue, the opinion, though suggesting some doubt about the matter, assumes, *arguendo*, that " 'deliberately' " was understood by the jury in this connection to mean "something more than" simply " 'intentionally' " (which had already been established by the guilty verdict.) *Id.* at 2948. It concedes that "Penry's mental retardation was relevant . . . to whether he was capable of acting 'deliberately.' " *Id.* at 2949. Nevertheless, "[p]ersonal culpability is not solely a function

of a defendant's capacity to act 'deliberately.' " A "rational juror" could have concluded "in light of Penry's confession" that he "deliberately killed . . . to escape detection."[21] However, "that same juror could also have concluded that Penry" – because his "mental retardation" made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," and "because of his history of childhood abuse" – "was less morally 'culpable than defendants who have no such

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[21] The opinion does not detail the content of the confession. However, it is described in the opinion of the Court of Criminal Appeals on direct appeal, *Penry v. State*, 691 S.W.2d 636 (Tex.Crim.App.1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986), as reflecting that Penry "had been planning for months to rape somebody and that in the three weeks prior to the instant offense appellant had focused on the deceased and [another] as possible victims," *id.* at 653, that on the morning of the offense when he decided to go to the victim's house (where he forced his way in) and rape her "I knew that if I went over to the chick's house and raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen," *id.* at 641, 652-53, and that while the victim was lying helpless on the floor following the rape "I came back and sat on her stomach. I told her that I was going to kill her and that I hated to but I thought she would squeal on me." *Id.* at 641.

The opinion of Justice Clinton, concurring in the result on the direct appeal, espouses the view that the failure to define "deliberately" was error (the majority held it was not error), but that the error was harmless "due to the fact that the evidence of 'deliberateness' was uncontested, overwhelming and in large part gleaned from appellant's written admissions." *Id.* at 657.

excuse,' but who acted 'deliberately' as that term is commonly understood." *Id.* Thus, in the absence of a sufficiently broad definition of deliberately "we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.*[22]

As to the second special issue dealing with future dangerousness, Justice O'Connor observes that Penry's mitigation evidence "is relevant *only* as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." *Id.* at 2949 (initial emphasis added). She continues by stating that the evidence of Penry's "mental retardation and history of abuse," through diminishing his blameworthiness, "indicates that there is a probability that he will be dangerous in the future," and then quotes with approval from Judge Reavley's opinion for this court in that case, including the following:

> " 'If anything, the evidence made it more likely, not less likely, that the jury would answer the

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[22] Judge Reavley, writing for the court in our consideration of *Penry*, observed concerning the deliberateness issue:

> "Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that [the first] issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a *major thrust* of the evidence of his background and child abuse, logically, does not." *Penry v. Lynaugh*, 832 F.2d 915, 925 (5th Cir.1987) (emphasis added), *rev'd*, *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

> second question yes. It did not allow the jury to consider a *major thrust* of Penry's evidence as *mitigating* evidence.' 832 F.2d at 925 (footnote omitted) (emphasis in original)." *Id.* at 2950 (initial emphasis added).

Justice O'Connor then turns briefly to the third special issue, concerning whether the killing "was unreasonable in response to the provocation, if any, by the deceased." Although the opinion recites the evidence supporting the affirmative answer to this issue,[23] it does not expressly say or even suggest that the mitigating evidence had any relevance to the question (nor does it recite that the State asserted any such relevance). *Id.* at 2950.

Justice O'Connor concludes that resentencing is required because "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to" the evidence of Penry's "mental retardation and abused background" in "rendering its sentencing decision." *Id.* at 2952.

Penry clearly stands for the proposition that merely because the mitigating evidence has *any* relevance to a negative answer to one of the special issues does not necessarily suffice in all cases to sustain application of the Texas statute. Penry's evidence had *some* such relevance to the first issue. The more difficult question is whether

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[23] "Penry's own confession indicated that he . . . killed her after her struggle had ended and she was lying helpless." *Id.* at 2950. *See also* n. 21 *supra* (indicating that killing was to avoid detection and was contemplated for this purpose from the beginning).

the Texas statute can operate as written in any case where the mitigating evidence, though all clearly relevant to support a negative answer to one or more of the issues, nevertheless also has *any* mitigating relevance *whatever beyond* the scope of the special issues. *Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can *also* fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the issues. That, indeed, was the case in *Penry*, where as to the third issue the mitigating evidence was all essentially irrelevant, as to the second issue it was *only* affirmatively harmful to the defense, and as to the first issue its favorable relevance was essentially minor but its "major thrust" was beyond the scope of the issue (see notes 21 and 22 *supra*).

We conclude that *Penry* does not invalidate the Texas statutory scheme, and that *Jurek* continues to apply, in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues. That is particularly appropriate in a case such as this, where there is no "major thrust" of any of the mitigating evidence which is not relevant to support a negative answer to the second special issue, the only special issue which *Jurek* addressed. Any other holding, it seems to us, would effectively render *Jurek*, and the Texas statutory scheme which it sustained, dead letters.

It is commonly accepted truism that, just as *none* of us is *all* good, so also *none* of us – not even those who will probably commit criminal acts of violence constituting a continuing threat to society – is *all* bad. The number of

capital crime defendants who have *nothing* in their background which might tend to reflect a positive character trait – who have *never* performed *any* voluntary service or exhibited *any* kindness to others or supported their family, to mention but three possible examples – must be minuscule at most. And this, of course, has been obvious all along. So too has it always been obvious that many defendants – because of some transitory condition such as relative youth or emotional distress incident to one of life's many crises to which all are subject such as divorce or loss of a loved one or a job – may, when they committed an offense, have been less able than those not so afflicted to control themselves and evaluate their conduct and its consequences. If *Penry* is read broadly, then in none of these cases can the Texas statutory scheme pass muster. Every one of these cases – the case where a month previously the defendant broke up with his girl friend or lost his job, the case where as a youth the defendant volunteered to mow a neighbor's yard or was in her early twenties when the offense was committed, and all the others – would demand some other system of sentencing trial. The Texas statutory scheme would be essentially meaningless and *Jurek* would have in substance been overruled.

We doubt that the Supreme Court intended this. Not only has the Court not expressly overruled *Jurek*, but to the contrary it has cited *Jurek* with approval numerous times. As an early example, in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court noted that *Jurek* upheld the Texas statutory scheme which "mandates a sentence of death" if the three "statutory penalty questions" are answered affirmatively, *id.* 100 S.Ct. at 2524 n.

1, and observed that Texas could properly ensure that its capital case jurors "be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias," while nevertheless recognizing that "jurors under the Texas . . . procedure unavoidably exercise a range of judgment and discretion while remaining true to their oaths." *Id.* at 2527. *See also Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). As we have previously noted, *Lockett* states that the deficiencies of the Ohio statute "can best be understood" by comparing it to, *inter alia*, the "significantly different" Texas statute which *Jurek* upheld. *Lockett*, 96 S.Ct. at 2965, 2966. While the *Eddings* plurality does not cite *Jurek*, many decisions of the Court since then have. We have noted the prominence given to *Jurek* in *Skipper*, 106 S.Ct. at 1671. Other post-*Eddings* decisions citing *Jurek* with approval include *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 554-55, 98 L.Ed.2d 568 (1988); *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2721, 97 L.Ed.2d 56 (1987); *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 876, 879, 79 L.Ed.2d 29 (1984) (declining to "effectively overrule *Jurek*"); *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3453-54, 77 L.Ed.2d 1171 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2742 n. 13, 77 L.Ed.2d 235 (1983). The *Franklin* plurality relied principally on *Jurek* and observed that the Texas "method for providing for the consideration of mitigating evidence has been cited repeatedly with favor." *Id.* 108

S.Ct. at 2331 (footnote omitted). Neither the *Franklin* concurrence nor *Penry* purports to jettison *Jurek*. Although *Penry* clearly makes an exception to *Jurek*, it gives no express indication that the exception made is conceived or recognized as being vastly broader than the rule itself, or that *Jurek* and the Texas scheme will thereafter remain valid only in the very rarest of cases.

Since *Penry*, the Court has continued to cite *Jurek* with approval. Thus, the Chief Justice's opinion in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 1081-82, 108 L.Ed.2d 255 (1990), joined in by Justices White, O'Connor, Scalia and Kennedy, describes *Jurek* and the Texas system in a way which obviously would be wholly inappropriate if either were viewed as still valid in no more than a small minority of cases. The same can be said for the opinion of Justice Kennedy, joined in by the Chief Justice and Justices White, O'Connor and Scalia, in *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 1261-62, 108 L.Ed.2d 415 (1990), the here pertinent language of which is quoted in the margin.[24] Plainly, Justice Kennedy

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[24] Justice Kennedy's opinion states:

> "to the extent that Penry's claim was that the Texas system prevented the jury from giving *any* mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. *Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting. . . .

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regards *Penry* as the exception to *Jurek*, not *Jurek* the exception to *Penry*.

Moreover, as Justice Kennedy points out is *Saffle* (see not 24, *supra*), a broad reading of *Penry* is inconsistent with *Penry's* holding that its result was "dictated by" *Lockett* and *Eddings* for purposes of *Teague*.

Similar considerations require rejection of any notion that a broad reading of *Penry* is consistent with *stare*

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> "Penry's claim, moreover, did not ask us to apply the reasoning of *Lockett* and *Eddings* so much as it required us to apply our decision in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *Penry* interpreted *Jurek* as holding that the Texas death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant. . . . Having thus construed *Jurek*, we concluded that resolution of Penry's claim that 'those assurances were not fulfilled *in his particular case*,' 492 U.S. at [318], 109 S.Ct. at 2947 (emphasis in original), did not involve the creation of a new rule. . . . *Penry*, . . . must be understood in terms of the Court's ruling in *Jurek*, and its application in later cases. We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek*. . . . ". *Id.* 110 S.Ct. at 1261-62 (initial emphasis added).

Justice Kennedy goes on to cite *Jurek* as an example of "our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Id.* 110 S.Ct. at 1262.

decisis because the Texas courts have not kept the "assurance" of *Jurek*, or the Texas scheme is really different than it appears on its face or had been described by the Texas courts prior to the Supreme Court's decision in *Jurek*. The opinion in *Jurek* – rendered the same day as *Woodson* required "particularized consideration of relevant aspects of the character and record of each convicted defendant" – explicitly recognizes that the Texas jury is only allowed to answer "yes" or "no" to three statutory questions and that if these are answered "yes" the death penalty is automatic. The exact working of the questions is reflected in the Court's opinion. The Court holds that the issue is whether these specific "enumerated questions allow consideration of particularized mitigating factors." *Id.* at 2956. The Court gives an affirmative answer *not* on the basis of any assumed special instructions or definitions being given to the jury, but rather *entirely* on what *evidence* the Texas courts have said may be brought before and considered by the jury *in answering* the second (future dangerousness) question. Thus, the Court relies on the Texas court opinion which it describes as interpreting "the second question to allow *a defendant to bring to the jury's* attention whatever mitigating circumstances he may be able to show." *Id.* (Emphasis added). The Court next quotes the Texas court's language in which it says "the jury could consider" various items of evidence – including matters such as presence or absence of past criminal conduct, "age of the defendant" and "mental or emotional pressure" – "[i]*n determining the likelihood that the defendant would be a continuing threat to society.*" *Id.* (emphasis added). The Supreme Court then says "[b]y authorizing *the defense to bring before the jury* . . . whatever

mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 2958 (emphasis added). This "assurance" has not been broken or even slightly bent, but on the contrary has been fully performed. Texas has continued to interpret its sentencing statute just exactly as the Supreme Court in *Jurek* assumed it would.

The Supreme Court's opinion in *Jurek* reflects that the defendant there was twenty-two years, old, had been drinking beer earlier in the day of the offense, and had been steadily employed and contributed to his family's support. *Id.* at 2954. At the very least, *Jurek* must stand for the proposition that these mitigating factors – relative youth and evidence reflecting good character traits such as steady employment and helping others – are adequately covered by the second special issue. *Penry* cannot hold otherwise and at the same time not be a "new rule" for *Teague* purposes. The decisions in *Eddings* and *Lockett* do not justify a contrary conclusion, as *Saffle* says "[w]e did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather" these cases "reaffirmed the reasoning in *Jurek*." *Saffle* at 1262.

We believe that what *Penry* represents is a set of atypical circumstances of a kind that, quite understandably, neither the Texas Court of Criminal Appeals nor the Supreme Court in *Jurek* had in mind, namely circumstances where the defense's mitigating evidence would have either no substantial relevance or only adverse relevance to the second special issue. Typically, evidence of good character, or of transitory conditions such as youth

or being under some particular emotional burden at the time, will tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is or may become over time, and that the defendant may be rehabilitable so as not to be a continuing threat to society. The core of *Jurek* – which we cannot conclude has been abandoned – is that the mitigating force of this kind of evidence is adequately accounted for by the second special issue. But in *Penry* the Court was faced for the first time with a wholly different type of mitigating evidence. Not evidence of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but *nonetheless* evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue. To recognize that, as *Penry* did, is not necessarily to deny the validity of *Jurek* as it applies to the more typical case.

We conclude that the core of *Jurek* remains intact, and we now apply it to the circumstances *sub judice*.

Youth

The primary mitigating factor which Graham urges was not adequately encompassed in the special issues is his youth. We disagree.

For at least five years before Graham's trial, it was established Texas law that the jury, in answering the second special issue, could consider "the age of the defendant." *Jurek v. State*, 522 S.W.2d 934, 940 (Tex. Crim.App.1975), *aff'd sub nom. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Since then, the Texas decisions have consistently followed this rule. For example, in *Roney v. State*, 632 S.W.2d 598 (Tex.Crim.App.1982), the Court of Criminal Appeals, noting that the defendant was seventeen and that "the age of the defendant" was "relevant in deciding the second punishment issue," *id.* at 601, held that considering the entire record, including the defendant's "young age," the evidence was insufficient to support the jury's affirmative answer to the second issue. *Id.* at 603. *See also, e.g., Robinson v. State*, 548 S.W.2d 63, 64 (Tex.Crim.App.1977); *Earvin v. State*, 582 S.W.2d 794, 798-99 (Tex.Crim.App. 1979); *Brasfield v. State*, 600 S.W.2d 288, 293 n. 3 (Tex.Crim.App.1980); *Keeton v. State*, 724 S.W.2d 58, 61 (Tex.Crim.App.1987).

The Supreme Court's opinion in *Jurek* affirmatively reflects that the defendant was "22 years old at the time" of the offense, *id.* at 2954, and, in upholding the death sentence and the Texas scheme, quotes, the portion of the Court of Criminal Appeals' opinion stating that in answering the second issue the jury can consider " 'the age of the defendant.' " *Id.* at 2957. *Jurek* thus squarely answers the question of whether "youth" is adequately taken into account by the second special issue. If *Penry* compels a different result, it would have been a new rule for purposes of *Teague*, as *Saffle* makes clear. Indeed, if *Jurek* may not apply to the very type of case that was then before the Court, it has been overruled. But, as noted, the

Supreme Court has not so treated it. Moreover, *Penry* itself involved a twenty-two-year-old defendant, *id.* at 2941, and the opinion contains no suggestion whatever that this fact was one which could not be adequately taken into account in answering the statutory special issues.[25]

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[25] Nor can we accept the notion that twenty two is not youthful for purposes of any constitutionally mandated rule that the capital sentencer must be able to take into account the defendant's "youth" at the time of the offense. Texas clearly regards those in their early twenties as youthful for this purpose. *See, e.g., Lackey v. State*, ___ S.W.2d ___ ___ (Tex.Crim. App.1991) (describing as a mitigating circumstance "youthful age (23) at the time of the offense"); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991) ("There is also mitigating evidence of appellant's youth; appellant was twenty-one years old at the time of the offense"); *Madden v. State*, 799 S.W.2d 683, 684 (Tex.Crim.App.1990) ("Appellant, however, introduced substantial mitigating evidence. He was only twenty-one years old at the time of this offense"). The salient factors which make "youth" mitigating – principally inexperience with resultant diminished judgment and selfcontrol – are all generally present among those in their early twenties, albeit to a lesser degree than in those still younger. And this, indeed, is the approach taken by Graham's counsel, as reflected in his statements in closing argument (see note 28 *infra; see also* text at note 9 call *supra*). We do not believe that for this purpose a categorical distinction is proper based on some specific age, such as eighteen, which is often the age of majority (in Texas minors are those under eighteen who have never been married; Tex. Probate Code § 3(t)) or the minimum age for purposes of engaging in certain conduct (cf. U.S. Const.Am. XXVI). The Supreme Court rejected such an approach in holding that the Constitution does not forbid the death sentence for offenses committed at age sixteen or seventeen. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Moreover, such an

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Since *Penry*, the Texas Court of Criminal Appeals has continued to hold that the second special issue provides an adequate vehicle for the jury to take into account the defendant's youth. *See Ex parte McGee*, 817 S.W.2d 77, 80 (Tex.Crim.App.1991); *Lackey v. State*, ___ S.W.2d ___ (Tex. Crim.App.1991); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). We, too, appear to have recognized this. *See DeLuna v. Lynaugh*, 890 F.2d 720, 722 (5th Cir.1989) (evidence that defendant was twenty-one when offense committed would not bring him within *Penry*).

As the panel majority and dissent each correctly recognized, youth is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory. *Graham*, at 898, 899. Therefore, whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to

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approach would be at war with the concept of individualized capital sentencing which underlies *Penry*. It is common knowledge that individuals develop and mature at different rates, and it will frequently be the case, for example, that one eighteen and, say, two months, is actually less "mature" and more "youthful" than another who is seventeen and eight months.

society. Thus, the second special issue affords an adequate vehicle by which the jury can give effect to the mitigating aspect of youth.

We reject the contention that the second special issue is inadequate for this purpose because the jury may believe that youth mitigated the defendant's culpability though not his future dangerousness. But youth is not mitigating with respect to conduct not attributable to it. Thus, *Penry* says that evidence of a defendant's background and character is relevant because " 'defendants who commit criminal acts that are *attributable to* a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Id.* at 2947 (quoting Justice O'Connor's concurrence in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)) (emphasis added). *See also Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 1199, 108 L.Ed.2d 316 (1990) (same).[26] To the extent that Graham's criminal conduct was a product of his youth he was for that reason not only less culpable but, to the same extent, also less likely to be dangerous when no longer young. To

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[26] It is true that a hypothetical juror might conclude that death is always an inappropriate penalty for capital murder committed by a seventeen year old simply because the offender was seventeen, and regardless of whether the offense was to any extent attributable to his youth. However, such a conclusion is not based on individualized consideration of the offender but merely on a characteristic which is *precisely* the same for him as for every other human being who attains that age, and as such amounts to no more than disagreement with the Texas law which allows execution of seventeen year olds for capital murder.

the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness. Nothing in the present record suggests that the jury here might have viewed the matter in any other light.[27]

Finally, the evidence here, and the manner in which the case was approached and tried in this respect, do not suggest any special factor or circumstance militating against application of what we conceive to be the appropriate general rule, namely that the mitigating force of the defendant's youth at the time of the offense may be adequately taken into account in answering the second special issue. In marked contrast to *Penry*, there is here nothing to suggest that defense counsel desired to have the mitigating force of youth presented or considered in any other manner than as a basis for a negative answer to the second special issue.[28] *Cf. Lowenfield*, 108 S.Ct. at 552

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[27] Moreover, to say that the second special issue is for this reason inadequate to take youth into account, is necessarily to also say that it is inadequate to take into account any other mitigating factor which is not wholly coterminous and synonymous with future dangerousness. Yet, as previously indicated, that would be contrary to the core holding of *Jurek*, and would in effect render *Jurek* and the Texas statute it upheld a dead letter. We do not read *Penry* as going that far.

[28] Counsel in essence argued that Graham's youth explained his May 13 to 20 crime spree and that he would grow out of it: "A young man, hasn't even reached 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget. . . . Gary Graham, 17 years old, went on a rage for 7 days," and:

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(even where absence of objection is not a waiver it may reflect posture and understanding of trial participants).

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> " . . . what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. . . . because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. . . . "

The only dissatisfaction counsel expressed with the charge or special issues was by pretrial motion asserting that the special issues left too much standardless discretion to the jury. See note 11, *supra*.

Nothing in the evidence indicates any basis for believing that the offense charged was any more (or less) a product of Graham's youth than any of his other criminal conduct shown by the evidence, and neither side ever suggested otherwise either at trial or in this court.

We reject Graham's contention in this court that his case is like *Penry* because here the prosecutor's argument (especially in respect to "direction" and "seeds of our past") amounted to an implied assertion that Graham's *youth* itself favored an affirmative answer to the second special issue. We disagree. The clearly most reasonable understanding of this unobjected to argument is that it is no more than the mere assertion that

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We reject Graham's contention that, in light of *Penry*, the mitigating force of his youth could not adequately be given effect in answering the special issues.

Other circumstances

Although the mitigating factor primarily at issue is youth, Graham also contends that under *Penry* the testimony of his stepfather, Samby, and his grandmother, Chron, constituted mitigating evidence which could not adequately be given effect in answering the special issues. We disagree.

With one exception to be noted, the testimony of Samby and Chron simply constituted rather mild evidence of normal, good – though not exceptionally good –

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Graham's criminal conduct was the most reliable predictor of the direction his future would take. There is absolutely nothing in the argument which implies that this is any *more* likely so because the events of May 13-20, 1981 occurred while Graham was seventeen as opposed to, say, thirty-five (nor even that this was *as* likely so as it would have been if Graham had been thirty-five in May 1981). The prosecutor was not required to concede that just because of Graham's youth he would not in the future be a danger to society. And, there is nothing inconsistent in the assertions that, on the one hand, some youthful criminals may pose a danger to society even after they mature, and, on the other hand, that criminal acts by youths are *less* likely to be predictive of future such behavior on their part as a mature adult than are similar acts by those who are already mature adults. Moreover, we are aware of nothing to suggest that Texas has ever treated youth in this connection as anything other than a factor tending to favor (albeit not necessarily to require) a "no" answer to the second special issue.

character on Graham's part: he had respect for and was nice to his mother and stepfather, cared about and was close to his mother, gave his grandmother no problems or trouble, was never violent, never had weapons, would willingly help out around the house, went to school and to church, "loved the Lord," worked and contributed to the support of his two children.

It appears to us that the principal mitigating thrust of all this evidence is to suggest that the events of May 13-20 were aberrational and atypical of Graham's true character and that he thus had potential for rehabilitation, and would not be a continuing threat to society. As such, the mitigating force of this evidence can adequately be given effect under the second special issue.

This evidence does not seem different in kind from that before the Supreme Court in *Jurek*, where the defendant's father testified that "the petitioner had always been steadily employed since he had left school and that he contributed to his family's support." *Id.* at 2954. Nor does this sort of character evidence seem other than wholly typical of what might be expected in a vast number of cases. As noted, were evidence of this kind held to invoke *Penry*, then *Jurek* and the Texas statutory scheme would for all practical purposes be wholly eviscerated.[29] Further, this sort of evidence is different in kind

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[29] We observe that since *Penry*, the Texas courts have held that this kind of evidence is not *Penry* evidence and does not mandate departure from the *Jurek* format. *See, e.g., Ex parte Baldree*, 810 S.W.2d 213, 216-17 (Tex.Crim.App.1991) (evidence that defendant "has been caring, kind, and nonviolent to

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from that involved in *Penry*, as its relevance to each of the special issues, and particularly the second, is entirely in the direction of a negative answer, and it has no tendency to reduce culpability for the particular crime charged in any way not encompassed within one or more of the special issues. Unlike *Penry* type disability evidence, which can reduce culpability where it is inferred that the crime is attributable to the disability while other similar offenders have no such "excuse," good character evidence provides no variety of "excuse." Further, absent some unusual indication of an essentially *permanent* adverse *change* in character (e.g., brain damage), to the extent that the testimony is convincing that the defendant's general character is indeed good it will also, to

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others . . . is . . . reflective of his character and bears upon his propensity, or lack thereof, for committing future violent acts" and thus is adequately covered by the second special issue without further jury instructions); *Richardson v. State*, 1991 WL 99949, ___ S.W.2d ___ (Tex.Crim.App. June 12, 1991, No. 68934) ("evidence of appellant's religious devotion is *Franklin* evidence and could be properly addressed by a jury answering issue number two"); *Mooney v. State*, 817 S.W.2d 693 (Tex.Crim.App.1991) (same). *See also Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). In *Boyd v. State*, 811 S.W.2d 105, 111-112 (Tex.Crim.App.1991), the court considered evidence that appellant "was a good worker and was promoted," "was always polite, nice and helpful," "always behaved in a respectful manner," and helped his sister "with her asthma" and his mother "when she hurt her ankle." *Id.* at 111. In rejecting a *Penry* claim, the court said that this evidence "was given full effect within the second special issue" and "[t]o hold otherwise would be tantamount to declaring the capital sentencing scheme facially unconstitutional." *Id.* at 112 (footnote omitted).

essentially the same extent, be convincing that he will not continue to be a threat to society.

There remains only to consider the brief portion of the testimony of Chron that Graham's mother was frequently hospitalized, commencing when he was approximately three, with what Chron characterized without elaboration as a "nervous condition" or "mental illness." In an appropriate context, evidence of this general kind might well form part of a proper *Penry* presentation. We conclude that it does not do so in this case, however, There was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject. Further, the entire context in which this testimony was presented, from the point of view both of Chron's testimony as a whole and of all the defense evidence at the sentencing hearing, suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like or that he had any mental or psychological problems. The entire thrust of the defense evidence, both from Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems," as Justice O'Connor used those terms in *Penry*. *Id.* at 2947. *See also Boyde*, 110 S.Ct. at 1199. In this respect, the evidence as a whole is simply not comparable to that in *Penry* or *Eddings*.

In sum, not only Graham's youth but also his other mitigating evidence could adequately be taken into

account in answering the special issues, particularly the second.[30]

Conclusion

As directed by the Supreme Court, we have further considered our previous affirmance of the district court's denial of habeas relief in light of *Penry*. We conclude that our prior disposition is consistent with *Penry*, and remain convinced that it was proper. Accordingly, we reinstate our prior mandate affirming the district court's dismissal of Graham's habeas petition.

AFFIRMED.

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS, and WIENER, Circuit Judges, join, dissenting:

The Supreme Court directed this court to reconsider Graham's petition in the light of *Penry*, not to modify *Penry* or to shape *Penry* for a comfortable fit with *Jurek*. In *Penry* Justice O'Connor wrote for the Court that the jury must be able to fully consider and give effect to all "evidence that mitigates against the death penalty" and is relevant to a defendant's background, character, or the

[30] We have focused throughout on the second special issue because it is with respect to it that Graham's evidence had the most apparent and strongest mitigating relevance, and because that is the issue addressed in *Jurek*. We do not imply, however, that Graham's evidence lacked mitigating relevance to the first (or even to the third) special issue; it does have such relevance, and that relevance strengthens our conclusion that the special issues were adequate in this case; but whether such relevance to issues other than the second would alone suffice to take this case out of *Penry's* scope is another matter.

circumstances of the crime. 109 S.Ct. at 2947, 2951. If youth is an important mitigating factor – and the Court has said that it is[1] – then *Penry* requires that the sentencing jury be allowed to decide that the death penalty is an inappropriate penalty for Gary Graham. That decision could not have been given effect in his case, and the writ should be granted.

The panel majority stated the *Penry* rule as follows: "a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence." 896 F.2d at 896. The en banc majority, after 21 months, produces an exclusion to the *Penry* rule and holds that no instruction or jury decision is needed for transitory circumstances of mitigation. This court says that any circumstance relevant to whether the defendant is rehabitable may be adequately treated by the answer to the second issue. Contrary to what the Supreme Court wrote, the Fifth Circuit explains *Penry* as an atypical case where the mitigating evidence either had no substantial relevance, or no adverse relevance, to the second special issue of future dangerousness. I believe my colleagues

[1] See panel opinion 896 F.2d at 897-98. In *Eddings v. Oklahoma* the Supreme Court said: "All this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must background and emotional development be duly considered in sentencing." 102 S.Ct. at 877.

have gone beyond and contrary to the directions of the Supreme Court and have usurped the role of our superiors.

Graham was 17 years old, legally a minor, when he committed the crime. It is beyond dispute that this fact was a mitigating circumstance, material to the "moral culpability" of the defendant. The jury's sentencing role is to consider such factors and determine whether the defendant is indeed personally and morally culpable. But "culpability" at the punishment phase is not simply a question of guilt or "blameworthiness," but rather a question of "deathworthiness." *See Lackey v. State*, ___ S.W.2d ___, ___ (Tex.Crim.App.1991) (en banc). To say that evidence mitigates a defendant's culpability is not to say that he is any less guilty or deserving of blame, but that he is less deserving of death. *See Penry*, 109 S.Ct. at 2950 (a juror could believe that "Penry lacked the moral culpability to be sentenced to death").

The special issues of the Texas statute demonstrate how evidence can be relevant to a defendant's culpability. The guilty defendant may be less deserving of death because the evidence shows that he did not act deliberately, or that he does not pose a continuing threat to society, or that his conduct was not unreasonable in response to provocation by the deceased. Indeed, much evidence is mitigating only because it is relevant to one or more of these issues. *See Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring) (evidence of the defendant's good conduct in prison had no relevance to his character outside of the special issues). But the message of *Penry* is

that some evidence may make the defendant less deserving of death for reasons "beyond the scope of the special issues." *Penry*, 109 S.Ct. at 2948. The evidence of Penry's mental retardation and history of abuse may not have made his crime less deliberate or his continuing threat to society less probable, but it may nevertheless have made him less deserving of death because it may have made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Id.* at 2949. Presented with the special verdict questions, and "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 2950.

This case presents the same dilemma. The jury found that Graham's youth did not make his crime less deliberate or his future threat to society less probable. But a reasonable juror could also have determined, if given the opportunity, that Graham did not deserve a death sentence because, at the age of 17, he was less able to control his impulses or evaluate the consequences of his conduct, or because of other relevant reasons. The majority seems to overlook the fact that "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." *Id.* at 2951. In this case, as in *Penry*, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [Graham's youth] by declining to impose the death penalty, . . . the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence

in rendering its sentencing decision." *Id.* at 2952. Under *Penry*, the jury should have been allowed to weigh that factor in deciding whether Graham deserved to be sentenced to death.

The majority of this en banc court insist upon crafting their own exclusion and following *Penry* only where there is a "major mitigating thrust of the evidence . . . substantially beyond the scope of all the special issues." They even declare that youth is mitigating only with respect to conduct attributable to age, and that the mitigating factor of youth at the time of the offense may be adequately taken into account by a Texas jury in answering the issue of future dangerousness. But the Supreme Court requires the sentencer, before assessing the death penalty, to consider all mitigating evidence, not only mitigating factors that contributed to particular criminal conduct. And the Court does not weigh the "thrust" of the mitigating evidence as between special issues and the decision to sentence to death.

Youth, like mental retardation or crippling circumstances in the defendant's background, may be related to deliberateness or to future dangerousness, but those facts of a defendant's life may also affect an entirely different "thrust" and decision. They may reach the much broader ultimate question: Is death the appropriate response to this human being, considering his moral culpability as a person? Graham's jury was not told that it could consider evidence in this light or that it could give mitigating effect to it in imposing sentence.

The majority opinion is heavy with scholarship and fine legal argument. It undoubtedly alleviates problems

in reviewing the cases of Texas prisoners on death row. I fully appreciate the problems. The Texas Court of Criminal Appeals is struggling with them too. *See Black v. State*, 816 S.W.2d 350 (Tex.Crim.App.1991); *Ex parte Harvey Earvin*, 816 S.W.2d 379 (Tex.Crim.App.1991); *Lackey v. State*, ___ S.W.2d ___ (Tex.Crim.App.1991). This does not justify the failure to follow the dictate of the Supreme Court. I would follow that dictate unless the Court, which alone has the authority, chooses to modify our instructions.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

The ultimate question in this case is whether the mitigating value of Graham's youth and family circumstances – age seventeen at the time of the offense – is fully expressed by the jury in its answer to two questions: did Graham act deliberately and does Graham present a future danger. The majority opinion, after first concluding that any deficiency in the two questions must be substantial, holds that the answer is yes. I am unpersuaded that the jury's assessment of Graham's moral culpability is fully, or substantially as the majority has it, exhausted by concluding that he acted deliberately and presents a future danger. A jury's reasoned response could be that although Graham acted deliberately, and is likely to do so again, when Graham's tender years and family circumstances are entered in the account of moral culpability, a death sentence is not warranted.

It was true before *Penry* that "[t]he state may not by statute preclude the sentencer from considering *any* . . .

relevant mitigating evidence."[1] That did not necessarily mean, however, that the state could not limit the effects of mitigation. There was a powerful argument that, given *Jurek*, the Eighth Amendment allowed the state to limit the effects a sentencer might give to mitigating evidence. Justice Scalia made the argument in *Penry*, but his was the dissenting view.

I intend no criticism of the majority's able struggle, but I am not persuaded that we have the freedom to define again the jury's sentencing role in Texas. I say "again" because two decisions of the Supreme Court control this case. The first is that the state, without fettering effect, must give the jury the means for expressing its reasoned moral response.[2] The second decides that Graham's youth and family circumstances are relevant to the core decision for the jury – his moral culpability.[3]

The state may insist upon the jury's "reasoned" moral decision, but the contribution of Graham's youth to his moral culpability, beyond the issues of deliberateness and future dangerousness, has no intrinsic measure or objective weight. There is a point at which we must accept that the moral culpability of a particular person for a particular crime is what the jury says that it is. With all deference, this quintessential blackbox decision yields

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[1] *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982).

[2] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[3] *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see also Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988).

to no logical or explainable divisor. It is not a "legal" question at all, but is rather like asking judges not to reason but to look to the sky, presumably, and react. Such discrete Rorschach-like inquiries do not produce normative rules. That we are asked to perform such tasks is a powerful signal that something is wrong. The wrong is not difficult to locate. As Justice Harlan put it in *McGautha*:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, *appear to be tasks, which are beyond present human ability* (emphasis supplied).[4]

Furman repudiated *McGautha*, but Justice Harlan's wisdom is validated with each encounter of dead ends in the resulting conceptual puzzle. And a puzzle it is.

For example, the Supreme Court in *Cabana v. Bullock*[5] upheld the death sentence while observing that "the jury may well have sentenced Bullock to death despite concluding that he had neither killed not intended to kill."[6]

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[4] *McGautha v. California*, 402 U.S. 183, 204, 91 S.Ct. 1454, 1466, 28 L.Ed.2d 711 (1971).

[5] 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

[6] 474 U.S. at 384, 106 S.Ct. at 696.

This despite the fact that in *Enmund v. Florida*[7] the court held that the Eighth Amendment forbids the death penalty for "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing takes place, or that lethal force will be employed".[8] I would have supposed that whether an accused intended to kill lies at the heart of moral culpability; that the finding of intent to kill would be left with the sentencer. Stated another way, if a state's procedures must allow a defendant's mitigating evidence to find expression in its verdict it is puzzling to allow a state appellate court to supply the critical finding of intent to kill, a finding missing from the jury's verdict. It is a long road from *McGautha* to *Penry*, but the resulting jurisprudence is perverse in that it insists on a reasoned moral response of the jury, an assignment we jurists have failed.

The solution must be left to the Supreme Court, at least in cases as this one where we are left no meaningful latitude. In any event, this case is already so postmarked by the predictable scattering of judges required to react, not reason.

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[7] 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

[8] 458 U.S. at 797, 102 S.Ct. at 3376.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-2168

D.C. Docket No. CR-H-88-563

GARY GRAHAM,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Dept. of Criminal Justice,
Institutional Div.,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

On remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, and BARKSDALE, Circuit Judges.*

---

* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

JUDGMENT

This cause came on to be heard on rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause is affirmed by the Court in banc.

January 3, 1992

ISSUED AS MANDATE:

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS and WIENER, Circuit Judges, join dissenting.

HIGGINBOTHAM, Circuit Judge, dissenting.

SUPREME COURT OF THE UNITED STATES

No. 91-7580

Gary Graham,
Petitioner

v.

James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 8, 1992

FILED
JUL 24 1992
OFFICE OF THE CLERK

No. 91-7580

In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

A seventeen-year-old capital defendant introduced mitigating evidence of his youth, acts of kindness, religious observance, redeeming character traits, and troubled family background. The sentencing jury was permitted by statute to answer only three questions:

> whether he acted "deliberately" in committing the offense,
>
> whether he might be dangerous in the future, and
>
> whether he acted unreasonably in response to any provocation by the deceased.

The jury was afforded no other vehicle for considering his mitigating evidence. Does this sentencing procedure satisfy the Eighth and Fourteenth Amendments?

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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 950 F.2d 1009 (5th Cir. 1992) (*en banc*). The opinion and order of the United States District Court for the Southern District of Texas is unreported; it is Appendix F to Mr. Graham's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1992. The petition for certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Eighth Amendment to the United States Constitution reads in pertinent part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution reads in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

The former Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989), provided

> (b) On conclusion of the presentation of the evidence [at the sentencing phase of a capital murder trial], the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

. . . .

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death

. . . .

STATEMENT OF THE CASE

A. Course of Prior Proceedings

A Houston, Texas jury found Mr. Graham guilty of capital murder in 1981.[1] J.A. 16. The jury answered "yes" to the statutory special issue questions and the trial judge sentenced Mr. Graham to death as required by Texas law. J.A. 17-18; *see* former Tex. Code Crim. Proc. art. 37.071 (Vernon's ed. 1989).

The Texas Court of Criminal Appeals affirmed in an unpublished *per curiam* opinion. *Graham v. State*, No. 68,916 (Tex. Crim. App. 1984). In June, 1987, the trial court scheduled Mr. Graham's execution for July 30, 1987. *See Graham v. Lynaugh*, 854 F.2d 715, 716 (5th Cir. 1988). Mr. Graham sought state court postconviction relief, and his execution was postponed to permit review of the issues he had raised. *Id.* The state district court held an evidentiary hearing on January 8, 1988, and later recommended that Mr. Graham be denied relief. *Id; see* J.A. 20-32 (trial court's findings of fact and conclusions of law). The Texas Court of Criminal Appeals adopted the district judge's findings and denied relief in an unpublished opinion on February 19, 1988. *Ex Parte Graham*, No. 17,568-01, slip op. (Tex. Crim. App. 1988). J.A. 33-38.

Mr. Graham thereafter sought relief through a federal *habeas corpus* petition. *Graham*, 854 F.2d at 717. The district

[1] Mr. Graham was convicted of intentional murder in the course of committing or attempting to commit robbery, pursuant to Tex. Penal Code § 19.03 (a)(2) (West ed. 1992).

court dismissed the petition and denied a certificate of probable cause. *Id.* Mr. Graham appealed to the United States Court of Appeals for the Fifth Circuit and sought a certificate of probable cause; that Court received briefs and heard oral argument. *Id.* Relying on *Jurek v. Texas*, 428 U.S. 262 (1976), and this Court's then-recent decision in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the court of appeals rejected Mr. Graham's claim that the application of the Texas capital sentencing statute in his case violated the Eighth and Fourteenth Amendments by precluding the consideration of relevant mitigating evidence. *Graham*, 854 F.2d at 718-720. Although five Justices of this Court had expressed serious doubts in *Franklin* about the constitutionality of the former Texas statute as applied, and this Court had already granted review in *Penry*, the court of appeals concluded that Mr. Graham had made no "substantial showing of the denial of a federal right," and denied his application for certificate of probable cause. *Id.* at 723. Nevertheless, because this Court had granted certiorari in *Penry*, the Fifth Circuit temporarily stayed Mr. Graham's execution to permit him to petition for certiorari. *Id.*

In the wake of *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court vacated the Fifth Circuit's decision in *Graham* and remanded for reconsideration. *Graham v. Lynaugh*, 492 U.S. 915 (1989). A Fifth Circuit panel, upon reconsideration, granted *habeas* relief. *Graham v. Collins*, 896 F.2d 893 (5th Cir. 1990). The court concluded that

> The point of *Penry* is not that a special instruction is not necessary if a jury could give *some* effect to relevant evidence through the statutory questions; rather, a special instruction is required if a jury cannot give *full* effect to that evidence.

Graham, 896 F.2d at 898 (emphasis in original).

After the panel granted relief on remand, Respondent obtained rehearing *en banc*. *Graham v. Collins*, 903 F.2d 1014 (5th Cir. 1990). The *en banc* court narrowly reversed the panel decision, affirming Mr. Graham's death sentence by a vote of 7 to 6. *Graham v. Collins*, 950 F.2d 1009 (5th Cir.

1992) (*en banc*). The *en banc* court rejected the panel's interpretation of *Penry*, holding instead that

> [No additional jury instructions are necessary unless the] major mitigating thrust of the evidence is substantially beyond the scope of all the special issues.

Graham, 950 F.2d at 1027.

This Court granted review. *Graham v. Collins*, ___ U.S. ___, 60 U.S.L.W. 3827 (1992).

B. Statement of facts

Bobby Grant Lambert was shot and killed at a Safeway food store in Houston, Texas, on May 13, 1981. R. Vol. XVI at 7-9, 66-69. Bernadine Skillern, who was in the parking lot of the store, saw a black man struggle with the victim and then fire a gun. R. Vol. XVII at 233-330. At trial, Ms. Skillern identified the defendant, seventeen-year-old Gary Graham, as the man she had seen shoot Mr. Lambert. *Id.* at 331.

After the jury returned its verdict of guilty of capital murder, the State presented its case for the death penalty. Its witnesses testified that during a seven-day period in May, 1981, Mr. Graham had engaged in an outburst of violent conduct, committing several criminal offenses. R. Vol. XIX at 74 – Vol. XX at 473. The defense presented evidence of Mr. Graham's character and his troubled childhood through the testimony of his stepfather and grandmother. R. Vol. XX at 475-487.

Mr. Graham's grandmother, Ms. Emma Chron, described his childhood. *Id.* at 481. Ms. Chron told the jury that Gary's mother had been plagued her whole life by mental illness, and that this "nervous condition" had required Gary's mother to seek hospitalization and treatment between twenty and thirty times. *Id.* at 482-483. As a result of his mother's illness, Ms. Chron explained, young Gary had been frequently moved from one relative's home to another. *Id.* Despite these moves and a consequent lack of parental care and guidance, she added, Gary Graham had gone to church "all the time,"

because "he loved the Lord," and had never given her any problems when he was in her care. *Id.* at 485-487.

Mr. Graham's stepfather, Mr. Joe Samby, described Mr. Graham's redeeming traits as an adolescent. He testified that Mr. Graham had always treated him with kindness and respect. *Id.* at 475. Mr. Samby testified that although young Gary lived with his father at that time, he often visited his mother and always responded eagerly to requests for help. *Id.* at 477. For example, Mr. Samby recalled, Gary would cut the yard and help out his mother around the house. *Id.* In addition, Mr. Samby testified, by the time he was fifteen years old Gary had a job working with his father. *Id.* at 478. From his earnings, Mr. Samby testified, Gary purchased food and clothing for his own children. *Id.* at 479.

At closing argument in the penalty phase, defense counsel emphasized Mr. Graham's present moral culpability as a seventeen-year-old boy, arguing for "compassion" for this "young man" as a "human being." *Id.* at 489-495. Counsel emphasized Mr. Graham's youth: "A young man, hasn't even reached twenty years old. Not even twenty years old. He goes on a rage for seven days, seven days out of his life. . . . Gary Graham, seventeen years old, went on a rage for seven days." *Id.* at 492, 494. Because of Graham's youth, counsel urged, the jury should "find some compassion for that human being," and give him a life sentence. *Id.* at 495.

Mr. Graham's other defense attorney echoed these same themes:

> [When] you look at a young man of his age, what do you think about? What do you think about the years when you think about death? You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where they're going or what they want to do. . . . You also have to look at changes in society. Changes in ages. . . . When you are 17 to 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. . . . [T]here is something about human nature that not only

> changes you, but slows you down as you live. If you live. If you live. I'm asking you, ladies and gentlemen, to give the man a chance to live. . . . I ask you for Gary Graham's life.

Id. at 499-504.

In response, the district attorney reminded the jurors that they had taken an oath to follow the law, and that the special issue questions were all they were permitted to answer. *Id.* at 504-510. He argued that Mr. Graham's youth was relevant not as an indicator of his present culpability, but exclusively as an index of future dangerousness:

> Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. And I stand before you now and I ask you on your oath as jurors to follow the law. . . .They ask you to look at his youth. . . . The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? . . . His seeds are death. Pain. Suffering. Humiliation. Degradation. . . .Under the evidence and beyond a reasonable doubt it is the only proper verdict. Yes, special issue number one. Yes, to special issue number two. . . .and the death of Gary Graham.

Id.

The trial judge had already told the jurors during *voir dire* how narrowly the statutory special issues were to be applied. Although he acknowledged that they would not be given an instruction defining "deliberate," he took care to emphasize that "deliberate" meant simply "intentional."[2] In

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[2] *See, e.g.*, J.A. 169 (trial judge to Meredith Montague: "In my mind, the word deliberately means it is a person's intention . . . to commit that act."); *id.* at 205-206 (to Donald G. Ondruch: "In my mind when someone does something deliberately, it means he intended to do that."); *id.* at 246 (to Hugh R. Killgore: "[D]eliberately . . . means that, in my mind anyway, it is a person's . . . intention to do something . . . . "); *id.* at 291 (to David Gilroy: "I construe deliberately [to mean a person's] intent."); *id.* at

addition, the judge repeatedly described "deliberate" conduct as having a "conscious objective," the precise statutory definition of "intent" under Texas law.[3] With respect to the

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319-320 (to Bobby J. Pryor: "When I think of a word, deliberately, and a person committing a deliberate act, I think that if the person intended to do what he did . . . . ", "[D]id he take that person's life deliberately . . . did he intend to do what he did[?]"); *id.* at 353 (to Ben Dent Bradley: "Deliberately, in my mind, means that . . . [h]e intended to do something. . . .It is something that he intended to do and does . . . "); *id.* at 420 (to Reed D. Arney: "I interpret deliberately to mean a person's . . . intent to do something"); *id.* at 90 (to Rayburn M. Hoover: "Some people consider deliberately to mean an intentional act . . . "); *id.* at 127 (to Dennis Graham: "Did he do so deliberately? . . . Was it his intention to do that?").

[3] *See, e.g.*, J.A. 169 (trial judge to Meredith Montague: "In my mind, the word deliberately means it is a person's . . . conscious objective to commit that act"); *id.* at 205-206 (to Donald G. Ondruch: "In my mind when someone does something deliberately, . . . [i]t was his conscious objective to do what he did"); *id.* at 246 (to Hugh R. Killgore: "[D]eliberately . . . means that, in my mind anyway, it is a person's conscious objective . . . to do something . . . "); *id.* at 319 (to Bobby J. Pryor: "When I think of . . . a person committing a deliberate act, I think [of] his objective or conscious objective to do what he did"); *id.* at 353 (to Ben Dent Bradley: "Deliberately, in my mind, means that it is a person's conscious objective to do something"); *id.* at 420 (to Reed D. Arney: "I interpret deliberately to mean a person's conscious objective . . . to do something," "For deliberately to be the situation, if it's a person's conscious objective to do something and he does it"); *id.* at 90 (to Rayburn M. Hoover: "Some people consider deliberately to mean . . . someone's conscious objective to do th[e] act"); *id.* at 127 (to Dennis Graham: "Did he do so deliberately? Was it his conscious objective to do that?"); *cf.* Tex. Penal Code § 6.03 (a) (West ed. 1992) ("a person acts intentionally, or with intent, with respect to his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result"); *see also* Charge of the Court, J.A. 5 (reciting this statutory definition of "intent"). Given the trial court's statements at *voir dire*, and the complete absence of any guiding or definitional instructions at the punishment phase, a reasonable juror plainly would have interpreted the first special issue only to require a finding of "intentional" conduct – a finding mandated by the verdict at the guilt phase, *see* Tex. Penal Code § 19.03 (a)(2) – and thus to preclude the consideration of mitigating evidence.

"future dangerousness" issue, the trial judge offered many examples by way of illustration. Taken together, these examples established a minimal threshold of "dangerousness" to justify an affirmative finding; the judge informed jurors that offenses as minor as "pour[ing] paint on the hood of your car" or the "slashing of tires" would suffice as "criminal acts of violence."[4]

Thus inoculated, the jury answered the special issues in the affirmative, and the court sentenced Mr. Graham to death as required by the former Texas statute. R. Vol. I at 70-75.

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[4] *See, e.g.*, J.A. 247-248 (trial judge to Hugh R. Killgore: "And criminal acts of violence, obviously, have a broad range of consideration- . . . .Someone pours paint on the hood of your car . . . "); *id.* at 295 (to David Gilroy: "[S]omeone pouring paint on your car as it sits in the parking lot right now. That is a criminal act of violence"); *id.* at 422 (to Reed D. Arney: "Someone takes their Harley-Davidson on the front lawn of Cy-Fair High School and does doughnuts on the front lawn, that is an act of criminal violence"); *id.* at 321-322 (to Bobby J. Pryor: "If somebody takes a screw driver [sic] and goes from one end of your car to the other end and tears up the paint job, that is a crime of violence, also"); *id.* at 354-355 (to Ben Dent Bradley: "Slashing of tires. The throwing of paint on paint jobs. These are criminal acts of violence that involve property, but nonetheless are still acts of violence . . . "); *id.* at 128-129 (to Dennis Graham: "Someone rips the seats of your car with a knife. These are all acts of violence . . . "); *id.* at 172 (to Meredith Montague: "Someone will fully destroy property you own. That is an act of violence . . . "); *id.* at 210 (to Donald G. Ondruch: "Someone steals a radio out of your car or truck. That is an act of violence. That is an act of criminal mischief. So, all these fall within that area of criminal acts of violence"); *id.* at 389-390 (to Billie Diane Gaskill: "If someone were to run a Volkswagen across your front porch and knock out one of the pillars, that is a crime of violence . . . "); *id.* at 455 (to Mary Ann Gaylord: "[C]riminal acts of violence . . . include . . . where someone may pull your glasses from your face and touch the side of your head, if you find that offensive . . . ").

SUMMARY OF ARGUMENT

Since 1976 this Court has taught that an individualized sentencing determination is an Eighth Amendment prerequisite to imposition of the death penalty.[5] To ensure that death is the appropriate punishment in a particular case, "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977). Only thus is the Eighth Amendment requirement of "heightened reliability" satisfied.[6] Accordingly, a State may

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[5] This Court's reliance on this principle (the "*Lockett* rule," after *Lockett v. Ohio*, 438 U.S. 586 (1978), adopted by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982)) to resolve other constitutional questions, in areas ranging from jury instructions to *voir dire* to the admissibility of "victim impact" evidence, illustrates its centrality to death penalty jurisprudence. *See Morgan v. Illinois*, ___ U.S. ___, 112 S.Ct. 2222 (1992) (requiring trial court to conduct *voir dire* adequate to determine whether prospective jurors will consider mitigating evidence at sentencing phase, and requiring exclusion of those who will not); *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991) (holding "victim impact evidence" admissible to counter broad admissibility of mitigating evidence under rule of *Lockett*); *Mills v. Maryland*, 486 U.S. 367 (1988) (invalidating jury instruction requiring unanimity as to the existence of particular mitigating factors).

Moreover, this Court's rejection of various *per se* barriers to the imposition of the death penalty – on 16- and 17-year-olds, for example, or on the mentally retarded – has rested on the assurance that each defendant will have a fair opportunity to convince the sentencer that the balance of aggravation and mitigation in his case warrants a life sentence, rather than the death penalty. *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989); *Penry*, 492 U.S. 302, 337-338 (1989); *see text infra*.

[6] *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Because of [the qualitative difference between a term of years and a death sentence], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). *Woodson* held that a statute that did not allow the sentencer to consider "the character and record of the individual offender and the circumstances of the particular offense" in determining whether death was

not "limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987).

This Court applied these basic principles to the now-discarded Texas capital sentencing scheme in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Having conditionally approved the former Texas statute on the promise that Texas would interpret the "special issue" format to permit the jury's full consideration of all mitigating evidence, the Court considered whether Texas had fulfilled that assurance in Penry's case. *Id.* at 315-317; *see also Jurek v. Texas*, 428 U.S. 262 (1976). This Court concluded that it had not. Penry's mental retardation and abused childhood were relevant to his moral culpability beyond the scope of the Texas special issues. Without special instructions, the jury had no way to express its "reasoned moral response" to Penry's mitigating circumstances by imposing a sentence less than death. Thus, there was an unacceptable risk that Penry was sentenced to death in spite of factors that might have called for a less severe penalty, and the Eighth Amendment required resentencing. *See Penry*, 492 U.S. at 328; *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). An application of *Penry* to Mr. Graham's case calls for the same conclusion.

Gary Graham was seventeen years old and the product of a troubled family background when he was charged with capital murder. The heritage of our criminal law teaches that Mr. Graham's youth alone could appropriately justify the exercise of leniency; the sentencer must be free to base a life sentence on such a powerful mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Stanford v. Kentucky*, 492 U.S. 361 (1989). Moreover, because of Mr. Graham's youth, "there can be no doubt that evidence of his turbulent family history . . . is particularly relevant" to the appropriateness of a

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the appropriate punishment violated the Eighth Amendment. *Id.* at 304. Between *Woodson* and *Lockett*, this Court invalidated two other mandatory death sentencing schemes on the same ground. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

death sentence. *Eddings*, 455 U.S. at 115. Despite his turbulent childhood, Gary Graham had shown religious devotion, and had grown into a teenager who helped his family and worked to support his own children. As in *Penry*, the jury that sentenced Mr. Graham to death could not consider and give independent weight to these mitigating factors.

The jury's sentencing deliberations were restricted to the former Texas special issues, which were presented in the bare terms of the statute. The trial judge had told the jurors during *voir dire* that "deliberateness" meant no more than "intent" and that "criminal violence" included acts as trivial as damaging the paint on someone's automobile. No further definitions or explanation of the terms used in the special issues were given in the instructions. Mr. Graham's youth, his family history, and his redeeming character traits had relevance to his moral culpability – to the appropriateness of a death sentence – wholly apart from the deliberateness of his crime or his likely future behavior as those issues were understood by his jury. Thus, the narrow questions presented to the jury virtually foreclosed an inquiry into Mr. Graham's personal culpability. Without instructions to broaden its discretion beyond a plain reading of the special issues, the jury could not express the "reasoned moral response" that Mr. Graham should be sentenced to life imprisonment rather than death because of his youth, background, and redeeming character traits.

Penry's integrity lies in its faithful adherence to the Eighth Amendment principle of *Eddings* and *Lockett*: a State may not preclude meaningful consideration of relevant evidence proffered in support of a life sentence. The capital sentencer must be allowed to express its "reasoned moral response" to the individual circumstances of the offender to ensure that "punishment [is] directly related to the personal culpability of the defendant." *Penry*, 492 U.S. at 319; *see also California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). When a defendant presents mitigating evidence of his background and character in support of a life sentence, the Eighth Amendment requires that the sentencer not be precluded from giving mitigating effect to *all relevant aspects*

of that evidence. The court of appeals erred in failing to apply this rule, substituting instead a concept – "major mitigating thrust" – foreign to the Eighth Amendment: the court of appeals finds no *Penry* violation unless the so-called "major mitigating thrust" of a defendant's evidence falls outside all the special issues. The "thrust" formula both unconstitutionally cuts off jury consideration of mitigating evidence and arrogates to reviewing courts a role properly reserved to the sentencer under state law. In Texas, a properly instructed jury must determine in the first instance whether particular mitigating evidence warrants a sentence less than death.

The circumstances of this case, in light of *Penry*, compel the conclusion that Mr. Graham may have been sentenced to death despite circumstances which called for a life sentence. *See Penry*, 492 U.S. at 328. A death sentence imposed under these circumstances violates the Eighth Amendment.

ARGUMENT

A. Prior decisions of this Court yielded in *Penry v. Lynaugh*, 492 U.S. 302 (1989), a straightforward test for determining Eighth Amendment error in the application of the former Texas capital sentencing statute.

Penry v. Lynaugh, 492 U.S. 302 (1989), applying *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Lockett v. Ohio*, 438 U.S. 586 (1978), established a clear test for the constitutional sufficiency of the former Texas capital sentencing statute as applied, namely, whether the jury was able to give "full consideration of evidence that mitigates against the death penalty" in answering the statutory "special issues." *Penry*, 492 U.S. at 328. *Penry* confirmed[7] that the former Texas

[7] A year earlier, five Justices had expressed serious doubts about the continuing vitality of the former Texas scheme after *Lockett* and *Eddings*. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). *Franklin* considered whether a bare stipulation of a clean prison disciplinary record could be given full mitigating effect under the former second special issue question. *Franklin*, 487 U.S. at 185. The concurring opinion (O'Connor, J., joined by Blackmun, J.), observed that such evidence "had no relevance to any other aspect of [Franklin's] character" apart from his propensity for future dangerousness, and concluded that under such circumstances the second special issue provided an adequate vehicle for the jury to consider and give effect to such evidence. *Id.*

special issue questions fail in certain cases to provide the jury any way to express the "reasoned moral response" that death is not the appropriate sentence for a particular offender. *Id.* Accordingly, *Penry* held that additional instructions would be required in such cases.

In *Penry*, the Court considered whether the former Texas statute adequately permitted independent mitigating consideration of evidence of mental retardation and childhood abuse. *Penry*, 492 U.S. at 307, 320. The State argued that *Jurek* foreclosed any constitutional attack on the Texas statute, but this Court concluded that the conditional endorsement of the Texas statute in *Jurek* rested on the possibility that the statute as applied would permit jurors fully to consider relevant mitigating evidence. Because the special issues foreclosed such consideration in Penry's case, the Court held, Penry's death sentence was constitutionally infirm.

Penry's jury was charged in the bare terms of the same Texas capital sentencing statute at issue here. *Id.* at 310. The jurors were instructed to answer three questions: whether Penry had acted "deliberately," whether there was a "probability" that he might be dangerous in the future, and whether he had acted "unreasonably" in response to any provocation by the deceased. *Id.* at 310; *see also* (former) Tex. Code Crim. Proc. art. 37.071. The jury answered all three questions affirmatively, and Penry was sentenced to death as required by statute.

To determine whether the former Texas scheme had permitted Penry's jury constitutionally sufficient latitude to

impose a life sentence based on his mitigating evidence, this Court employed *Lockett*'s simple test:[8]

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[9] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (notes omitted) (emphasis in original); *see also Eddings*, 455 U.S. at 110. This Court concluded that the former Texas statute had too narrowly cabined the jury's "reasoned moral response" to Penry's evidence.

This Court first noted that Penry's mental retardation and his experience of abuse as a child were relevant to the first special issue – that is, they could be given some mitigating effect in answering whether he had acted "deliberately." *Penry*, 492 U.S. at 322; *see also* 492 U.S. at 356 (Scalia, J., dissenting) (noting relevance of Penry's evidence to the first special issue).[10] Similarly, these features of Penry's background and character had some mitigating relevance to the

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[8] Because Penry sought relief via federal habeas corpus, the Court first inquired whether the rule Penry urged was "new," in which case habeas relief would generally have been unavailable. *Penry*, 492 U.S. at 313; *see Teague v. Lane*, 489 U.S. 288 (1989). The Court concluded that the rule Penry sought was not "new;" on the contrary, it held, such a result was "*dictated*" by *Lockett* and *Eddings*. *Penry*, 492 U.S. at 319. This holding confirms that this Court's analysis in *Penry* was a straightforward application of the rule of *Lockett*.

[9] This Court on several occasions left open the possibility that an extremely narrowly defined capital offense – *e.g.*, murder by a prisoner already serving a life sentence – might justify a mandatory death penalty. This Court ultimately rejected the notion that the Eighth Amendment could ever permit the sentencer to impose death without first considering the reasons *not* to do so. *Sumner v. Shuman*, 483 U.S. 66 (1987).

[10] For purposes of this inquiry, the Court assumed without deciding that the jurors understood "deliberateness" to mean something more than "intent." *Penry*, 492 U.S. at 322.

third issue, whether he had acted "unreasonably" in response to provocation. *Id.* at 324.[11] Penry's evidence, however, had no mitigating relevance with respect to the "future dangerousness" question. *Id.* at 323-324. The question, then, was whether the jury's answers to the three special issue questions permitted them to give *full* mitigating weight to Penry's evidence.[12] Penry was entitled to additional jury instructions to allow the jury to give effect to his mitigating evidence notwithstanding its failure to raise a reasonable doubt concerning the special issues and its plain mitigating relevance to two of the three special issues.

With respect to the first special issue, this Court noted that "punishment should be directly related to the personal culpability of the criminal defendant," but held that "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Penry*, 492 U.S. at 319 (citing *Lockett* and *Eddings*), 322. Thus, a reasonable juror could have concluded that Penry acted "deliberately" as that term is commonly understood, but also that, because of his mental retardation and his background of abuse, he was less personally culpable – less deserving of death – than a defendant without such characteristics. *Id.* at 322-323. In the absence of special instructions, however, such a juror could not give effect to this conclusion in answering the first special issue.

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[11] It is significant that the Court concluded that Penry's jury required additional instructions even though his evidence had mitigating relevance to two of the three former "special issues," since a "no" answer to any single issue would have precluded the imposition of death. That the former statute provided "some" vehicle for the consideration of evidence as mitigating, then, plainly does not guarantee compliance with the Eighth Amendment in a particular case.

[12] *See Franklin*, 487 U.S. at 183 (plurality opinion), 185 (concurring opinion) (no Eighth Amendment error because the minimal mitigating evidence offered had no relevance to any facet of the defendant's character or background apart from its relevance to the likelihood of his future dangerousness, which was wholly encompassed in the second special issue).

With respect to the second question, Penry's evidence, despite its intuitively mitigating quality, actually supported an affirmative answer to the "future dangerousness" inquiry. *Id.* at 323. As a result, a reasonable juror who had concluded that Penry's evidence reduced his blameworthiness for the offense such that a less severe punishment was appropriate, but who was bound by oath to answer the special issues candidly, could not give effect to her ultimate conclusion concerning Penry's personal moral culpability. *Id.* at 324.

Under the third question, as under the first, Penry's intellectual deficit and history of abuse could have been considered in determining the "reasonableness" of his response to any provocation by the victim. *Id.* at 324. However, this Court acknowledged that Penry's impairment would not "necessarily diminish the 'unreasonableness' of his conduct" in response to any provocation. *Id.* Additional instructions were therefore required to permit a juror "who believed Penry lacked the moral culpability to be sentenced to death" to express that view, notwithstanding an affirmative response to the third special issue. *Id.*

In sum, *Penry* held that – given the strong command of *Lockett* and *Eddings* – the former Texas statute deprived Penry of an individualized determination of sentence. Although in 1976 that statute facially had not "operated . . . to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute *as applied* had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the enumerated categories of the special issues. *See Penry*, 492 U.S. at 317. This Court concluded that resentencing by a properly instructed jury was necessary to ensure that death was not imposed despite factors calling for a lesser sentence. *Penry*, 492 U.S. at 328. *See also Lockett*, 438 U.S. at 605; *Eddings*, 455 U.S. at 119.[13]

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[13] *Penry's* reexamination under *Lockett* of the statute conditionally endorsed in *Jurek* parallels this Court's similar reconsideration of the scheme it had facially approved in *Proffitt v. Florida*, 428 U.S. 242 (1976). *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Hitchcock introduced mitigating evidence

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Hitchcock, 481 U.S. at 397. The Florida statute under which Hitchcock was sentenced – the statute approved in *Proffitt* – had limited "mitigating circumstances" to an enumerated list, though that restriction had subsequently been removed (post-*Lockett*, by the Florida legislature). Justice Scalia held for a unanimous Court that because some of Hitchcock's mitigating evidence had fallen outside the scope of the items on the former statutory list, his sentencing "did not comport with the requirements of . . . *Lockett*," and resentencing was required. *Id.* at 399.

1. As *Penry* illustrates, the Eighth Amendment requires adequate instructions to permit the jury's reasoned consideration of the defendant's moral culpability.

The focus on culpability in a capital sentencing proceeding is a function of the Eighth Amendment requirement of an individualized sentencing determination. For this reason, a State may not restrict a capital sentencer's "reasoned moral response" to some subset of all the relevant facets of the defendant's personal culpability. If it did so, the jury's decision might not reflect a "reasoned moral response" to the unique individual and the crime. Although this Court has taught us that "jurors *are* well-equipped to analyze the evidence." *Griffin v. United States*, ___ U.S. ___, 112 S.Ct. 466, 474 (1991) (emphasis in original), this observation reflects only that jurors in a capital case will be moved by the evidence for and against death, and are able to apply their human experience to understanding and assessing it. At the same time, however, this Court has cautioned that when jurors

"have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Id.* Justice O'Connor's earlier observations on the former Texas capital sentencing statute reflect this emphasis on the importance of adequate jury instruction, and anticipate this Court's decision in *Penry:*

> If . . . petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

Franklin, 487 U.S. at 185 (concurring opinion). Thus, in determining whether a particular capital jury was able to perform its Eighth Amendment role, it is not enough to consider merely what evidence was or could have been placed before it. Of equal constitutional concern is whether the jury was able, under the pertinent instructions, to give effect to all proffered facts about the defendant's background and character that might make a sentence less than death appropriate. *Lockett*, 438 U.S. at 605.

When a State permits a capital sentencer to consider only certain facets of a defendant's background and character, those issues necessarily define the limits of sentencer discretion.[14] When the issues a capital sentencer must decide preclude it from responding to relevant mitigating evidence by imposing a life sentence because that evidence is irrelevant

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[14] Such a limitation may be imposed by statute, by jury instructions, or by a trial court's interpretation of governing law. *See, e.g., Hitchcock*, 481 U.S. at 398 (statute limiting mitigating factors to enumerated list); *Penry*, 492 U.S. at 322-326 (jury instructions limiting discretion to fully consider mitigating evidence); *Lockett*, 438 U.S. at 594 (trial court interpreted sentencing statute to forbid independent consideration of mitigating factors); *Eddings*, 455 U.S. at 113 (same).

to, or has relevance beyond, the inquiries to which the sentencer is limited, the sentencer's discretion has been unconstitutionally restricted. A death sentence imposed under such circumstances violates the Eighth Amendment.

2. Realizing that their sentencing statutes might preclude the jury from assessing the defendant's moral culpability, both Texas and Oregon moved to comply with the Eighth Amendment imperative of adequate jury instruction.

In light of *Penry*, the Texas legislature recognized that the former Texas statute confined jury discretion too narrowly to satisfy the Eighth Amendment in most cases. Accordingly, the legislature discarded the old scheme in favor of one affording the jury an explicit vehicle for giving effect to its reasoned moral response to all the mitigating circumstances in a particular case. The new statute retains the "special issue" format,[15] but with one vitally important difference: if the jury answers the "aggravating" special issues affirmatively, it must then determine

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

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[15] The current Texas capital sentencing statute in fact retains only the second special issue (the "future dangerousness" question) from the former statute. *See* Tex. Code Crim. Proc. art. 37.071 (b) (1). In cases prosecuted under the law of parties (pursuant to Tex. Penal Code §§ 7.01, 7.02), the new statute poses an explicit *Enmund* inquiry ("whether the defendant actually caused the death of the deceased or did not actually kill the deceased but intended to kill the deceased or another or anticipated that a human life would be taken"); *see Enmund v. Florida*, 458 U.S. 782 (1982).

Tex. Code Crim. Proc. art. 37.071, § 2 (b) (1), § 2 (b) (2), § 2 (e) (West ed. 1992).[16] This "catchall" mitigation issue now provides Texas juries the constitutionally required latitude to give independent weight to all relevant mitigating evidence in imposing sentence.

Penry likewise revealed the potential inadequacy of Oregon's capital sentencing statute, which had been explicitly modeled on the pre-*Penry* Texas scheme. After *Penry*, the Oregon Supreme Court invalidated that statute as applied in every case it considered, and required resentencing by a jury given a "catchall" mitigating evidence instruction. *See State v. Wagner*, 786 P.2d 93 (Or. 1990) (Opinion on remand from this Court in light of *Penry*).[17] Thus, Texas and Oregon, the

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[16] The new statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." *Id.*, § 2 (f) (4).

[17] Wagner had presented mitigating evidence of mental instability, suicide attempts, employment efforts, artistic ability, above-average intelligence, and relative youth; at least one judge on the Oregon court found Wagner's evidence "sparse" and still concluded that the special issues had denied him an individualized determination of sentence. *Wagner*, 752 P.2d at 1209-1210 (Gillette, J., dissenting from original affirmance of death sentence before this Court's remand in light of *Penry*).

After *Penry* and *Wagner*, the Oregon court required resentencing in every case it considered. *See State v. Farrar*, 786 P.2d 161 (Or. 1990) (evidence that defendant's mother had suffered from multiple sclerosis, that his father was mentally ill and violent, and that defendant suffered from a growth disease, had to be institutionalized, repeatedly attempted suicide, did not learn to read and write until he was incarcerated, and abused drugs, required resentencing under *Wagner* and *Penry*), *cert. denied*, 111 S.Ct. 212 (U.S. 1990); *State v. Moen*, 786 P.2d 111 (Or. 1990) (evidence of diminished culpability based on drinking and attempt to prevent one of the victims from obtaining drugs requires resentencing under *Wagner* and *Penry*). *See also State v. Rose*, 810 P.2d 839 (Or. 1991) (death sentence vacated under *Wagner* and *Penry*); *State v. Walton*, 809 P.2d 81 (Or. 1991) (same); *State v. Pinnell*, 806 P.2d 110 (Or. 1991) (same); *State v. Stevens*, 806 P.2d 92 (Or. 1991) (same); *State v. Douglas*, 800 P.2d 288 (Or. 1990) (same); *State v. Simonsen*, 798 P.2d 241 (Or. 1990) (same); *State v. Guzek*, 797 P.2d 1031 (Or. 1990) (same); *State v. Smith*, 791 P.2d

only two states that unduly constricted the jury's consideration of mitigating evidence through the "special issue" format, have modified their statutes to satisfy the Eighth Amendment mandate of *Lockett* and *Penry*.

B. A reasonable and conscientious juror who concluded that Mr. Graham's mitigating evidence warranted a sentence other than death had no way to give effect to that conclusion.

Gary Graham was seventeen, legally a minor, at the time of the offense for which he was sentenced to death. He was also the product of an unstable and unsupervised home environment, his mother constantly hospitalized for treatment of her mental illness. As a result of this turbulence and uncertainty in what should have been his nurturing home, young Gary was shuttled from relative to relative. Despite his background, Gary was respectful and helpful to his elders, a deeply religious child who volunteered to perform chores for the adults around him. As he grew into a teenager, Gary was still noted for his kindness and his eager willingness to respond to requests for help. Moreover, Gary by age fifteen was working a job to help support his own two children, buying them food and clothing from his earnings.

These features comprise a richly textured portrait of a teenager that a rational juror could have determined to spare from the ultimate penalty.[18] However, as this Court

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836 (Or. 1990) (same); *State v. Montez*, 789 P.2d 1352 (Or. 1990) (same); *State v. Nefstad*, 789 P.2d 1326 (Or. 1990) (same); *State v. Miranda*, 786 P.2d 155 (Or. 1990) (same).

[18] *Boyde v. California*, 494 U.S. 370, 385 (1990) (that defendant was "good with children" is mitigating); *South Carolina v. Gathers*, 490 U.S. 805 (1989) (White, J., dissenting) (that defendant was an affectionate and caring person and was not given sufficient guidance and discipline at home is mitigating); *Mills v. Maryland*, 486 U.S. 367 (1988) (youth (age twenty) is mitigating); *Burger v. Kemp*, 483 U.S. 776 (1987) (defendant's neglectful family background is mitigating); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (that defendant was "a fond and affectionate uncle to the children of

recognized in *Penry*, the narrow special issues of the former Texas statute gave the jurors no adequate way to transform such a "reasoned moral response" to this evidence into a life sentence for Gary Graham.

1. Mr. Graham's youth, having unique power to counsel against a death sentence, could have evoked the "reasoned moral response" that he should not be put to death for his crime, but that conclusion might not have found expression in the answers to the special issue questions.

This Court has made repeated and forceful reference to youth as the archetypal mitigating factor that may justify a sentence less than death. Almost every member of the present Court has acknowledged this basic principle; for example, as early as 1976 this Court expressly acknowledged that a capital defendant's youth would mitigate against the imposition of the ultimate penalty:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (*e.g., his youth*, . . .)

Gregg v. Georgia, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (emphasis added).

A year later, in *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977), youth leapt quickest to mind among potential elements of mitigation:

> [The sentencer is constitutionally bound to consider circumstances] such as the *youth of the offender*, . . . the influence of drugs, alcohol, or

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one of his brothers" is mitigating); *Tison v. Arizona*, 481 U.S. 137 (1987) (youth (one defendant was nineteen, the other twenty) is mitigating).

> extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 637 (emphasis added).[19]

Lockett itself confirms the centrality of youth as a mitigating factor. The Ohio capital sentencing statute failed under the Eighth Amendment because it precluded the jury from considering mitigating evidence except as that evidence bore on three narrow questions. *See Lockett*, 438 U.S. at 607. This Court held that scheme unconstitutional because, *inter alia*, "considerations of a defendant's comparatively minor role in the offense, or *age*, would generally not be permitted, *as such*, to affect the sentencing decision." *Id.*, 438 U.S. at 608 (emphasis added).

When a majority of this Court endorsed *Lockett*, it again specifically emphasized the critical importance of a defendant's youth as evidence mitigating against the death penalty. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). As the Court explained,

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. *Eddings was a youth of sixteen years at the time of the murder*. . . . The trial judge recognized that *youth must be considered a relevant mitigating factor*. But youth is *more than a chronological fact*. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . [J]ust as *the chronological age of a minor is itself a relevant mitigating factor of great weight*, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

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[19] *See also Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987) (quoting with approval *Roberts'* descriptive list of potential mitigating factors, and striking down Nevada statute imposing mandatory death penalty for prison murders committed by life-term inmates).

455 U.S. at 115-116 (all emphases added).[20] Justice O'Connor noted that the defendant's status as a minor required that the Court take "extraordinary measures" to ensure that his evidence in support of a life sentence be fully and fairly considered. *Id.* at 118 (O'Connor, J., concurring).

In 1989, this Court considered whether the Eighth Amendment permitted the execution of seventeen-year-old capital defendants[21] *at all;* Justice Scalia rested this Court's holding that the Constitution erects no such *per se* bar on the condition that "individualized consideration is a constitutional requirement [in capital cases], . . . and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's *age*."[22] *Stanford v.*

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[20] Even the dissenting Justices acknowledged that a young defendant's age is a mitigating factor which can, alone, support a sentence less than death. *Eddings*, 455 U.S. at 122 (Burger, C.J., dissenting) (noting that trial court had "taken account of Eddings' unfortunate childhood," and did not conclude that "*either* [Eddings'] youth *or* his family background was sufficient to offset the aggravating circumstances. . . . ") (emphasis added).

[21] That is, persons who – like Gary Graham – were seventeen years old at the time of the capital offense in question.

[22] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. *See, e.g., Hill v. Lockhart*, 927 F.2d 340, 343 (8th Cir. 1991) ("[t]he determination whether an individual qualifies as a youth for purposes of mitigating against the death penalty is a subjective one appropriately made by a properly instructed jury"), *cert. denied*, ___ U.S. ___, 112 S. Ct. 344 (1991); *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987) (defendant's young age [17] "is a powerful mitigating circumstance"); *High v. Kemp*, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor"), *cert. granted, in part*, 487 U.S. 1233 (1988), *vacated*, 492 U.S. 926 (1989); *Moore v. Balkcom*, 716 F.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating), *cert. denied*, 465 U.S. 1084 (1984); *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982) ("[youth] is a substantial and relevant factor which must be given great weight"); *People v. Frank*, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2816 (1991); *Brown v. Francis*, 326

Kentucky, 492 U.S. 361, 375 (1989) (emphasis added).[23] Justices White and Kennedy, and the Chief Justice, joined Justice Scalia in affirming this basic principle, and no Justice disagreed with it.

This consistent line of authority reflects a widely shared understanding about the mitigating value of youth and youthfulness that traces deep roots in Anglo-American society. Although under Texas law a seventeen-year-old is eligible for the death penalty,[24] jurisprudence, history, tradition, science, and common sense all teach that an adolescent may be less culpable for his actions than an adult. As noted above, this Court recognized in *Eddings* that

> . . . youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years

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S.E.2d 735 (Ga. 1985), *cert. denied*, 474 U.S. 865 (1985); *Finney v. State*, 320 S.E.2d 147 (Ga. 1984), *cert. denied*, 470 U.S. 1088 (1985); *State v. Searcy*, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when murder manifested "exceptional depravity," is "sufficient to avoid capital punishment"); *Ice v. Commonwealth*, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no question but that [the defendant]'s young age at the time of the offense is an important factor in his case that should have been given serious consideration . . . at the sentencing phase"), *cert. denied*, 469 U.S. 860 (1984); *State v. Barber*, 753 S.W.2d 659, 669 (Tenn. 1988) (jury was entitled to find defendant's youth mitigating even when he was 29 years old), *cert. denied*, 488 U.S. 900 (1988).

[23] The traditional importance of youth as a mitigating factor is also reflected in the fact that "[t]wenty-nine states [specifically designate] the defendant's age as a mitigating factor in capital cases." *Stanford*, 492 U.S. at 375, 375 n. 5 (listing statutes).

[24] *See Cannon v. State*, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985) (capital sentence for defendant under eighteen years old not unconstitutional), *cert. denied*, 474 U.S. 1110 (1986); *Ferguson v. State*, 573 S.W.2d 516, 525 (Tex. Crim. App. 1978) (same), *cert. denied*, 442 U.S. 934 (1979).

> of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

455 U.S. at 115-116 (citation omitted).[25]

Young people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral decisions than are their elders. Young people likewise may not easily learn from experience or mistakes:

> In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries.

Erikson, *Childhood and Society* 261-263 (1963). They may be substantially impaired in their ability to control dangerous impulses:

> Risk-taking with body safety is common in the adolescent years . . . [including, for example, teenagers'] car racing, excessive use of drugs and alcoholic beverages, and other similar activities. . . .

Gordon, The Tattered Cloak of Immortality, in Corr and McNeil, eds., *Adolescence and Death* 16, 27 (1986). Indeed,

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[25] Scientific inquiry confirms this reasonable surmise, especially with respect to teenagers accused of murder. As one group of researchers has concluded,

> Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive.

Lewis, Pincus, *et al. Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States* (report prepared for presentation to the American Academy of Child and Adolescent Psychiatry) 11 (1987).

young people characteristically are so unable to weigh alternatives or evaluate the consequences of their conduct that they may unintentionally imperil themselves or others:

> The adolescent lives in an intense present: 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future.

Kastenbaum, Time and Death in Adolescence, in Feifel, ed., *The Meaning of Death* 99, 104 (1959). In sum, "[t]he difference that separates [juveniles] from adults [is their] immature, undeveloped ability to reason in an adultlike manner." Streib, *Death Penalty for Juveniles* 3-20, 184-189 (1987).

The sentencer in a capital case must be permitted to consider and give effect to both these mitigating qualities of "youthfulness," and to the chronological fact of youth itself. As this Court noted in *Eddings*, "[e]ven the normal 16-year-old customarily lacks the maturity of an adult," and the typical juvenile defendant is hardly normal, having been – like Gary Graham – "deprived of the care, concern, and parental attention that children deserve." 455 U.S. at 116. These mitigating qualities, while not suggesting "an absence of responsibility for the crime of murder," nevertheless may call for a sentence less than death and so must "be duly considered in sentencing." *Id.* *Eddings* distinguished "the chronological age of a minor," which is "itself a relevant mitigating factor of great weight," from "the background and mental and emotional development of a youthful defendant," and concluded that the Eighth Amendment requires that the sentencer be permitted to consider and give independent mitigating weight to *both*. *Id.*

Thus, *Eddings* holds that an adolescent defendant's lack of maturity, impulsiveness, inability to weigh consequences, and poorly developed sense of responsibility, as well as the bare fact of his age alone, are directly relevant to the jury's decision concerning the appropriateness of the death penalty as a punishment. It follows that a sentencing scheme which

precludes the sentencer from giving independent mitigating weight to evidence of youth violates the constitution.[26]

Eddings suggests at least one additional ground upon which a defendant's youth independently could support a sentence less than death. As the Court observed, "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings*, 455 U.S. at 115 n.11. A reasonable juror could conclude that the ultimate cost for such an abdication of responsibility should not fall on the teenage defendant whose moral and social development suffered as a result.

This discussion demonstrates that youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a death sentence is inappropriate in a given case. However, the jury that sentenced Mr. Graham was unable to voice the conclusion that Mr. Graham's youth justified a life sentence notwithstanding the answers to the special issues.

Under the first special issue question, Mr. Graham's mitigating evidence was either irrelevant to the jury's inquiry, or had relevance beyond its scope. *See Franklin*, 487 U.S. at 185; *see also Penry*, 492 U.S. at 322. Like Penry's mental retardation, Mr. Graham's youth was relevant to whether he was capable of acting "deliberately," because they made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry*, 492 U.S. at 322-323; *see also* social science sources cited *supra*. Yet, if a juror believed that Mr. Graham had acted "deliberately," as the trial judge had explained the term, but concluded, based on his mitigating evidence of youth, that he did not deserve to

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[26] Justice O'Connor noted that "of course, the relevant Oklahoma statute permits the defendant to *present* evidence of any mitigating circumstance." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (emphasis added). Because the sentencer could not *consider* and *give effect* to this evidence, however, the young defendant's death sentence violated the constitution. *Id.*

die, that juror could not express this "reasoned moral response."[27] This situation is precisely the same one condemned in *Penry*. This Court has recognized that "personal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Penry*, 492 U.S. at 322. As a result, a sentencing verdict that indicates only that the defendant acted "deliberately" does not necessarily entail the conclusion that he ought to be sentenced to death. For this reason, the first special issue precluded the jury from considering or giving full mitigating effect to Mr. Graham's evidence of youth.[28]

Mr. Graham's mitigating evidence could do him no more good under the second special issue. As a consequence of Mr. Graham's youth, a reasonable juror could have found him "less able than a normal adult to control his impulses or to evaluate the consequences of his actions." *Penry*, 492 U.S. at 322. These qualities, however, would have compelled an attendant finding that Mr. Graham was likely to be dangerous again in the future,[29] particularly given the extraordinarily

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[27] Given that the jurors had already convicted Mr. Graham of an "intentional" killing, and that the trial judge at *voir dire* had relentlessly urged them to equate "intentionally" with "deliberately," it is apparent that any inquiry into Mr. Graham's moral culpability, at least as reflected in the answer to the first special issue, was foreclosed by their verdict at guilt.

[28] The Texas Court of Criminal Appeals has admitted that only a "moment of deliberation" on the part of the defendant was necessary under the former Texas statute to support an affirmative finding of "deliberateness." *Cannon v. State*, 691 S.W.2d 664, 677 (Tex. Crim. App. 1985). Given this *de minimis* standard, it is even more apparent that the jury may not have been able to consider Mr. Graham's youth in responding to the first special issue.

[29] One judge on the Texas Court of Criminal Appeals has acknowledged this effect:

> . . . in answering [the "future dangerousness" inquiry], a jury would decidedly consider the range and severity of the defendant's prior criminal conduct; yet truly "mitigating" evidence – such as a mental disease or defect, a deprived, abusive childhood *or the youth of the defendant* – while mitigating against a death sentence in general, *surely has tremendous specific*

low "threshold" for an affirmative finding as explained by the judge during *voir dire*.[30] Put bluntly, youth supports an affirmative answer to the second special issue because the jury must consider a longer period of time during which the young defendant may commit some violent act, than if he were a mature adult. The focus of the second special issue on predicting future behavior, rather than assessing present culpability, thus precluded the jury from considering and giving effect to Mr. Graham's youth as an example of those "compassionate [factors] stemming from the diverse frailties of humankind" which might reasonably support a life sentence. *Woodson*, 428 U.S. at 304. Instead, the former Texas statute turned this compassionate factor against Mr. Graham and made it support his condemnation and execution. Like Penry's evidence of mental retardation and childhood abuse, Mr. Graham's evidence of youth was a "two-edged sword;" because of the preclusive effect of the Texas statute, only the aggravating "edge" of Mr. Graham's evidence could be given effect by the jury. *See Penry*, 492 U.S. at 323-324.[31]

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probative weight in favor of answering the future dangerousness question "yes."

Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim. App. 1984), (Clinton, J., dissenting) (emphasis added); *see also Eddings*, 455 U.S. at 126 n.8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths may not immediately cease to be violent).

[30] Many of the examples of "criminal acts of violence" emphasized by the trial judge were nothing more than minor vandalism – throwing paint on cars, scratching them with keys, or riding on the schoolhouse lawn with a motorcycle. *See* n.4 *supra*. Any reasonable juror would have associated such acts almost exclusively with juveniles, and hence would have concluded that 17-year-old Gary Graham's youth required a "yes" answer to the second special issue.

[31] Of course, evidence relevant to a capital defendant's fate may often have this "two-edged" quality. For example, evidence of drug abuse, while potentially mitigating, *see Burger v. Kemp*, 483 U.S. 776, 813 (1987); *Bell v. Ohio*, 438 U.S. 637, 641 (1978), could also be perceived as aggravating by a particular juror since it might reflect voluntary lawless behavior. The key difference is that under the former Texas statute, a reasonable juror who regarded such "two-edged" evidence as *mitigating*, and wanted to impose a life sentence on that basis, could not do so within the straitjacket of the unadorned "special issue" scheme.

Under the third special issue, as under the first, the mitigating relevance of Mr. Graham's youth was not exhausted by its relevance to the question of provocation by the deceased. A conscientious juror could have concluded that any killing not in response to a lethal threat – any killing that is not legally excused by self-defense – is "unreasonable;" yet, that same juror could have concluded that Mr. Graham's youth made a death sentence excessive. Again, permitted only to respond to the statutory inquiries, such a juror may well have been prevented from expressing the reasoned belief that Mr. Graham's youth justified sparing his life.

2. Mr. Graham's troubled background, particularly in light of his youth, could have convinced a juror that he was not so culpable as to deserve death; however, a conscientious juror might have been precluded from giving effect to this conclusion in answering the special issue questions.

Gary Graham's family background failed to provide him the nurturing, care, and guidance necessary for him to grow into normal adulthood. When he was a child, his mother suffered repeated bouts with mental illness; she was hospitalized twenty to thirty times as a consequence. Because his mother's nervous breakdowns removed her from the home, other relatives had to step in and try to help raise young Gary. He was shuttled from one environment to the other, staying with his mother during those intervals when she was lucid and his grandmother when his mother was hospitalized. Sometime after he was ten or eleven years old, his father re-entered the family picture and joined the progression of Gary's caretakers.

Although other influences shape our social development, there can be no question that, at least from infancy to pre-adolescence, a child's parents and home environment most strongly affect her progress toward maturity. Instability, neglect, and unpredictability in the life of a child often have destructive consequences for that child's mental and emotional development. Thus, a child reared in an unstable home may well lack vital resources for dealing with the inevitable traumas and disappointments of later life.

A juror could have reasoned, based on the evidence concerning Mr. Graham's troubled family background, that he had failed to receive the nurturing and guidance necessary to cope with the pressures and changes of adolescence and to develop the judgment and insight of a normal healthy teenager. Gary Graham was not just a person who had committed violent and destructive acts over a seven-day period. He was a teenager who by fifteen was struggling to shoulder the difficult responsibilities of fatherhood. He was a young man who, throughout his childhood, had been deprived of the nurturing and stability necessary to help him master the turbulent years of adolescence.

This Court has instructed us that

> Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. In some cases, such evidence properly may be given little weight. ***But when the defendant was 16 years old at the time of the offense*** there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

Eddings, 455 U.S. at 115 (emphasis added). This passage only acknowledges what common sense would recognize: the younger the defendant, the likelier that his behavior reflects the consequences of his troubled background. When the experiences that distorted a teenage defendant's psychological growth and moral development in the past are still relatively fresh, their outline may more easily be traced in the present. When such a defendant is only seventeen, the inference that

his turbulent childhood influenced his present behavior is certainly powerful, and one that the jury was entitled to make.

A reasonable juror could have concluded, based on the evidence of Mr. Graham's troubled family background, that he was less morally culpable for the offense than if he had been raised in a supportive home with proper guidance, and thus deserved a sentence less than death. However, if that same juror answered the special issue questions according to the evidence and in light of the trial judge's explanations at *voir dire*, she could not give effect to this conclusion.

Under the first special issue, Mr. Graham's turbulent family background was relevant to whether he was capable of acting "deliberately," since the likely effects of that upbringing – lack of insight and poor judgment, to name two – would color his ability to act in a "deliberate" manner as that term is commonly understood. Like Penry's mental retardation, Mr. Graham's troubled family background indicated that he might be "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry*, 492 U.S. at 322-323. Just as in *Penry*, however, the relevance of Mr. Graham's turbulent background to the appropriateness of a death sentence was not exhausted by its tendency to prove that his actions were not "deliberate." Because the jurors were given no instructions to guide their application of the first special issue, except for the trial judge's repeated equation of "deliberateness" and "intent," the jurors answering the first special issue in accordance with their oath were unable to give effect to their ultimate "reasoned moral response" concerning the appropriate sentence for Mr. Graham. Once the trial court established such a low threshold of proof for "deliberateness" – essentially crossed by the time the jury arrived at punishment – an affirmative finding on the first issue was a foregone conclusion.

As moral culpability is not solely a function of the capacity to act deliberately, neither is it solely a function of one's likely future conduct. One's youth and the effects of one's childhood have present mitigating value unrelated to one's potential for violent acts in the future. In fact, the very

circumstances which may mitigate moral culpability for present behavior may, as they did in this case and in *Penry*, increase the likelihood that one may be dangerous in the future.

With respect to the second special issue, Mr. Graham's troubled family background, like Penry's evidence of an abused childhood and mental retardation, was relevant to the jury's inquiry, but suggested an *affirmative* answer to the question of future dangerousness. A reasonable juror might well have concluded that Mr. Graham's troubled childhood had left him impaired in his ability to deal with other people, especially in situations charged with uncertainty or potential threat. Such a juror – reasoning that, as the district attorney argued at closing, "[t]he seeds of our past are the harvest of the future" – would be compelled to conclude that Mr. Graham, precisely *because* he had been raised in an unstable environment, without adequate supervision or nurturing, might lack the psychological and emotional resources to respond to such situations in a mature and nonviolent manner. The trial judge's emphasis on crimes of vandalism during *voir dire* would make it likelier still that such a juror would be oath-bound to return a "yes" answer to the second special issue. Limited only to the bare terms of the "continuing threat" inquiry, and informed by the judge that any minor act of vandalism would suffice to support an affirmative answer, a juror who concluded that Mr. Graham should not suffer death because his troubled background sufficiently reduced his moral culpability, *despite the likelihood that he might be dangerous at some point in the future*, had no vehicle for voicing that response.

The third special issue similarly failed to afford an adequate vehicle for the consideration of Mr. Graham's turbulent family background as mitigating. Since the jurors were not instructed on any standard to apply concerning the "reasonableness" of Mr. Graham's response to any provocation by the deceased (*e.g.*, whether the standard was one of objective or subjective reasonableness), a rational juror could have concluded that Mr. Graham acted "unreasonably" in killing the deceased. At the same time, it is plain that such a juror

could have concluded that Mr. Graham's turbulent background reduced his moral culpability so that a death sentence was not warranted, whether or not he had acted "unreasonably" in committing the offense. Without additional instructions, such a "reasoned moral response" could find no expression in the answer to the third special issue.

3. A reasonable juror could have viewed Mr. Graham's redeeming character traits and his acts of kindness as justifying a sentence less than death, but the focus of the special issues unfairly trivialized these factors in comparison to evidence of future dangerousness.

As defense counsel stressed in his closing argument at the punishment phase, Gary Graham had lived seventeen years as a kind, helpful, reverent, young man; against this brief lifetime of uniformly positive character traits was set one week in which Mr. Graham spun terribly out of control. If asked whether Mr. Graham's lifetime of redeeming traits, balanced against those seven awful days, could justify a sentence less than death, a reasonable juror might well have answered "yes."[32] However, the jurors were not permitted to express their response to the evidence in that fashion; instead, as with Mr. Graham's evidence of youth and his troubled family background, they were confined to the three bare "special issue" questions of the former Texas statute. So restricted, such a juror may have been unable to express the conclusion that Mr. Graham's redeeming traits justified sparing his life.

Mr. Graham presented evocative evidence of his positive character traits and acts of kindness. The jury learned that young Gary attended church regularly, because he "loved the Lord." As he grew older, he never failed to volunteer to do chores for members of his family, and to assist anyone who needed help. Too, Gary earnestly attempted at fifteen to

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[32] This is precisely the inquiry posed by the post-*Penry* capital sentencing statute in Texas. See Tex. Code Crim. Proc. art. 37.071 § 2(e).

shoulder the responsibility of caring for his own two children, taking a job with his father so that he could provide them food and clothing. The testimony established that, with the exception of one week in May, 1981, Mr. Graham's seventeen years had been characterized by religious devotion and loving care for his family.

Under the first special issue, Mr. Graham's mitigating evidence could have no effect on the jury's answer; his lifetime of kind acts and familial concern could neither prove nor disprove the "deliberateness" of his offense. This evidence, though unquestionably mitigating under every decision of this Court since 1976,[33] was wholly irrelevant to the first special issue question. As anticipated in *Franklin*, this evidence of "voluntary service, kindness to others, [and] religious devotion" was relevant to Mr. Graham's moral culpability but had nothing to do with the "deliberateness" of his offense. *Franklin*, 487 U.S. at 186. Particularly in light of the *voir dire* comments of the trial judge, equating "deliberateness" with "intent," this Court cannot be confident that the jury's reasoned moral response to Mr. Graham's mitigating evidence of redeeming character traits and acts of kindness found expression in its answer to the first special issue.

Mr. Graham's redeeming qualities were relevant to the second special issue – the "future dangerousness" inquiry. As the Fifth Circuit recognized, *see infra*, a history of positive character traits might give a jury some grounds for predicting an individual's future behavior. But to confine the value of

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[33] *See, e.g., Parker v. Dugger*, 498 U.S. ___, 111 S. Ct. 731, 736 (1991) (evidence of defendant's "positive adult relationship with his own children and with his neighbors" is mitigating); *Boyde v. California*, 494 U.S. 370, 385 (1990) (evidence that defendant was good with children is mitigating); *South Carolina v. Gathers*, 490 U.S. 805, 817 (1989) (O'Connor, J., dissenting) (evidence that defendant was affectionate and caring person and had been a quiet and affectionate child is mitigating); *Franklin v. Lynaugh*, 487 U.S. 164, 186 (1988) (O'Connor, J., concurring) (religious devotion is mitigating); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (evidence that defendant was a fond and affectionate uncle to his brother's children is mitigating).

such evidence to "negating" a prediction of future dangerousness confuses two distinct inquiries. The assessment of present moral culpability for an offense is not the same thing as an empirical prediction of future behavior. The point of *Penry* is that the judgment whether a particular defendant deserves the death penalty may properly be informed by, but should not be foreclosed by, a determination that he may pose a threat to society in the future. *See Penry*, 492 U.S. at 328. Collapsing the two conflates a choice about *value* – whether a particular defendant *should* suffer death, measured in part by setting the worth of the defendant's life against the harm done by his acts – with a prediction of *fact* – whether that defendant *might* commit some unspecified act of violence in the future. This Court has repeatedly acknowledged the fact-bound, context-specific, subjective quality of capital sentencing,[34] which reflects its properly discretionary character. As the Court noted in *Penry*,

> Indeed it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or circumstances of the offense. Rather than creating a risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned *moral* response to the defendant's background, character, and crime."

Id. at 327-328 (citations omitted).

This Court in *Penry* did not distinguish between positive and negative mitigating evidence. Rather, it held that the constitution is violated whenever a jury is not given an adequate vehicle by which it may fully consider and *give*

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[34] *See, e.g., Turner v. Murray*, 476 U.S. 28, 33-34 (1986) (fact that capital sentencing is irreducibly discretionary may require special procedures to prevent influence of racial prejudice); *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

effect to the mitigating evidence it hears, whether that evidence concerns the defendant's redeeming qualities or his "bad character." *Cf. Graham*, 950 F.2d at 1029 (*Penry* applies only to evidence "not of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence"). Just as evidence of mental retardation and childhood abuse have mitigating value not completely encompassed by the former Texas special issues, so too does extensive mitigating evidence of *redeeming* personal qualities.

People do not worship God, work at jobs, and show affection and support for their families merely to prove to the world at large that they present no threat of violence in the future. We rightly attach a greater value to a person's lifelong endeavors – even if they span only seventeen years – than reducing them to ciphers in a calculus of "future dangerousness." It is because the focus of the second special issue is so relentlessly narrow that the Eighth Amendment is offended, in cases like Gary Graham's, where a jury must limit consideration of all redeeming qualities based solely on its scope.

All the mitigating value of Mr. Graham's life cannot be shoehorned into the narrow consideration of the possibility of his future dangerousness. The mitigating value of his seventeen years of peaceful and supportive living was lost to the facts surrounding a single week of unlawful activity. Because the trial judge so trivialized the jury's inquiry into future dangerousness – authorizing them to return an affirmative answer if they suspected Mr. Graham might "scratch the paint on a car," or "ride his motorcycle on the high school lawn" – the jury could not give weight to Mr. Graham's evidence of redeeming characteristics in answering the second special issue.

The third special issue afforded no adequate vehicle for giving effect to Mr. Graham's evidence of redeeming character traits and acts of kindness. As with the first special issue, these facts were simply irrelevant to a determination whether he acted "unreasonably" in response to any provocation by the deceased. Thus, this evidence could not affect the jury's

answer to the third special issue, and its mitigating value was lost.

Mr. Graham's extensive mitigating evidence of religious devotion, concern for his children, love for his family, and acts of kindness could not be given full independent mitigating weight by a jury restricted to the special issues. The significance of these facts about Mr. Graham's character and record to his moral culpability for the offense is not adequately captured in the jury's determination whether he acted "deliberately," whether there was a "probability" that he might be dangerous in the future, or whether he had acted "unreasonably" in response to any provocation. That is, the fact that Mr. Graham had regularly attended church, "loved the Lord" and worked hard to provide his children food and clothing were relevant to his character – to whether he should be put to death – in a more fundamental and basic sense than their relevance to these three narrow inquiries. A reasonable juror could have concluded that Mr. Graham acted deliberately, might be dangerous in the future, and acted "unreasonably" in response to any provocation – and *nevertheless* have concluded that, as dissenting Judge Higginbotham put it in the court below, "when Graham's tender years and family circumstances [were] entered in the account of moral culpability, a death sentence [was] not warranted." *Graham*, 950 F.2d at 1036 (Higginbotham, J., dissenting). It is this "reasoned moral response" which *Penry* mandates the jury be empowered by instructions to effect.

C. The Fifth Circuit's analysis disregards the difference, recognized in Penry v. Lynaugh, 492 U.S. 302 (1989), between moral culpability on the one hand and the focus of the special issue questions on the other.

The *en banc* Fifth Circuit majority disregarded the key distinction this Court drew in *Penry*: the difference between "personal moral culpability" and the factual findings evidenced by the answers to the special issue questions of the former Texas capital sentencing statute. *Penry* holds that

those answers may inform and influence the jury's "reasoned moral response," but they cannot determine it. In a given case, the two may converge; if a defendant's mitigating evidence has no relevance to his personal culpability beyond its expression in the answers to the special issue questions, then the Eighth Amendment permits a death sentence to be imposed on the basis of those answers alone. *See Franklin*, 487 U.S. at 185-186 (O'Connor, J., concurring). If, however – as in Mr. Graham's case – the mitigating evidence could reasonably support a life sentence notwithstanding "yes" answers to the special issues, the Eighth Amendment requires that the jury be given instructions to effect that conclusion.

The court of appeals, ignoring the plain teaching of *Lockett*, *Eddings*, and *Penry*, continues to view the answers to the special issues as the only important index of the defendant's moral culpability, and accordingly as determinative of sentence in all but the rarest cases. As the Fifth Circuit summarized its holding

> We conclude that *Penry* does not invalidate the Texas statutory scheme, and that *Jurek* continues to apply, in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues.

Graham, 950 F.2d at 1027. This tortured analysis, which continues to exalt the answers to the special issues and begrudge a straightforward assessment of the defendant's moral culpability, turns *Penry* on its head. The *Graham* test as described above is complex enough; closer inspection reveals it as a Procrustean bed of limitations, qualifications, and reservations. The very intricacy of the Fifth Circuit's test reveals its incompatibility with *Lockett's* clear mandate; this section will address some of the ways the *Graham* formula departs from settled Eighth Amendment principles of capital sentencing.

First, the *Graham* formula compels a complex two-part inquiry: the reviewing court must initially determine the "major mitigating thrust" of a defendant's evidence. Then, it must measure the degree by which this "thrust" exceeds the scope of each special issue of the former Texas statute. Only

if the "thrust" is "substantially" beyond the scope of all of the special issues is resentencing required. *Graham*, 950 F.2d at 1027. This elaborate system finds no support in this Court's Eighth Amendment cases.[35]

Graham nowhere suggests how to distinguish the "major mitigating thrust" of a defendant's mitigating evidence from some lesser "thrust," or why the distinction, even if the majority could articulate it, has constitutional significance. The very idea of "thrusts" as an Eighth Amendment concept is at odds with the objective which this Court has traditionally understood capital sentencing juries to pursue. The ultimate goal of the Eighth Amendment requirement of the consideration of mitigating evidence is to permit the jury to determine whether the evidence taken as a whole points to life imprisonment, rather than death, as the appropriate sentence. In such an inquiry, it is the "whole ball of wax," rather than a single feature of a defendant's character or background, that may move a reasonable juror to decline to impose death.[36] This Court has recognized this practical reality in its own descriptions of the jury's role at sentencing: "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.' " *Turner v. Murray*, 476 U.S. 28, 33-34 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). Judge Higginbotham highlighted the same key principle in his dissenting opinion below:

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[35] Ironically, Penry himself could not have prevailed under *Graham*. *Graham* demands that the defendant's "mitigating thrust" substantially exceed *all* of the special issues before resentencing is required. Penry's mental retardation and childhood abuse plainly had significant mitigating relevance to the "deliberateness" issue. Thus, under *Graham*, Penry would not have been entitled to an additional vehicle for the jury's consideration of this evidence.

[36] *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 398 (1987) (describing defense counsel's argument urging jury to "look at the overall picture . . . consider everything together . . . consider the whole picture, the whole ball of wax" in determining the appropriate sentence).

> There is a point at which we must accept that the moral culpability of a particular person for a particular crime is what the jury says that it is. With all deference [to the majority], this quintessential blackbox decision yields to no logical or explainable divisor.

Graham, 950 F.2d at 1036 (Higginbotham, J., dissenting). The Fifth Circuit's "major mitigating thrust" formula attempts to craft precisely such a "logical divisor," and fails. This Court has made clear that it is instead a thoroughgoing "reasoned moral response" – an informed decision whether, when the defendant's aggregate background and character are considered, death is warranted – toward which the Eighth Amendment "thrusts" at punishment. Five other dissenters below likewise criticized the majority's hypertechnical calculus:

> Youth, like mental retardation or crippling circumstances in the defendant's background, may be related to deliberateness or to future dangerousness, but those facts of a defendant's life may also affect an entirely different "thrust" and decision. They may reach the much broader ultimate question: Is death the appropriate response to this human being, considering his moral culpability as a person? Graham's jury was not told that it could consider evidence in this light or that it could give mitigating effect to it in imposing sentence.

Graham, 950 F.2d at 1035 (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting).

The *en banc* majority's "major mitigating thrust" test is at war with this Court's repeated description of a capital sentencing jury's decision as a "reasoned moral response," sensitive to *all* the unique facts and circumstances of the particular case. *See, e.g., Penry*, 492 U.S. at 323. This Court's cases make plain that such a "response" is informed by "the experience of mankind, as well as the long history of our law," in divining those diverse human qualities which tradition, precedent, and logic identify as relevant to moral culpability. *Goss v. Lopez*, 419 U.S. 565, 590 (1975) (Powell, J., dissenting). Accordingly, the Eighth Amendment "does not

weigh the 'thrust' of the mitigating evidence as between [the] special issues and the decision to sentence to death." *Graham*, 950 F.2d at 1035 (dissenting opinion).

In another qualification of this Court's established Eighth Amendment rules, the *Graham* majority restricted *Penry's* application to cases in which the defendant's mitigating circumstances were permanent. *See Graham*, 950 F.2d at 1031; *see also id.* at 1034 (dissenting opinion) ("[the majority] holds that no instruction or jury decision is needed for transitory circumstances of mitigation").[37] This proposition – that any mitigating circumstance which time might ameliorate can be given adequate consideration in answering whether the defendant may be dangerous in the future – is as insupportable under the Eighth Amendment as the "major mitigating thrust" test.

This "permanence" requirement reflects the Fifth Circuit's failure to appreciate that the relevance of mitigating evidence to one of the special issues does not necessarily exhaust its relevance to an appropriate sentence.[38]

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[37] This holding subsequently has been invoked to deny *Penry* relief where defendants presented evidence of alcoholism and acute intoxication. *See Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir. 1992) ("Barnard's evidently frequent episodes of heavy alcohol consumption, alcohol intoxication, and marijuana use does not demonstrate that the episodes were attributable to a permanent handicap"); *see also Cordova v. Collins*, 953 F.2d 167, 169-170 (5th Cir. 1992) (evidence that defendant was "drinking heavily" at the time of the offense, drank frequently, and "act[ed] crazy" when drunk, "not the kind of uniquely severe permanent handicap" requiring additional jury instructions under *Penry*) *cert. denied*, ___ U.S. ___, 112 S. Ct. 959 (1992).

[38] The court below also erred in its insistence that Mr. Graham's youth must somehow explain or excuse the capital offense in order to be constitutionally mitigating. *Graham*, 950 F.2d at 1031 ("[y]outh is not mitigating with respect to conduct not attributable to it"). This argument ignores this Court's consistent instruction to the contrary. *See, e.g., Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597, 2602-2603 (1991) (mitigating evidence "*must* be received" and considered, even if it is not related to the circumstances of the crime (emphasis in original); noting that evidence that

Undeniably, youth is relevant to the jury's decision whether the defendant may pose a future threat to society. But all those who are found to present such a risk may not be "blindly subjected to the penalty of death." *Woodson*, 428 U.S. at 304. The sentencer must be allowed to consider whether a particular "dangerous" individual nevertheless deserves a sentence other than death, based on factors our society has long regarded as justifying leniency. According to *Lockett*, *Eddings*, and *Penry*, the jury must have an opportunity to give affirmative mitigating weight to youth – not merely to consider it as "negating" the possibility of future dangerousness.[39]

This conclusion is compelled not only by *Penry* but by *Eddings* as well. Under the Oklahoma scheme at issue in that case, the trial court was required to determine whether Eddings posed a "continuing threat to society."[40] In reversing Eddings' death sentence, this Court never suggested that the fact that his youth would have mitigated against such a finding exhausted its relevance to his appropriate sentence. *Eddings*, 455 U.S. at 107, 108 n.3. *Eddings* establishes that both the chronological age of a minor and the attendant transitory infirmities of youth are constitutionally mitigating, and the sentencer must be empowered to give them

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defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite not being causally related to the offense).

[39] *See Lockett*, 438 U.S. at 608 (instructions must permit sentencer to consider the defendant's "age . . . as such" in determining appropriate sentence).

[40] The language of Oklahoma's "future dangerousness" aggravating factor precisely tracked that of the second special issue of the Texas statute: whether there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Eddings*, 455 U.S. at 107, citing Okla. Stat., Tit. 21, § 701.12 (7) (1980).

independent weight in imposing sentence. *Eddings*, 455 U.S. at 115-116.[41]

Graham also requires a reviewing court to substitute its judgment concerning the mitigating weight of the specific facts and circumstances of each case for that of the jury. The result is not the sensitive "reasoned moral response" of a jury familiar with the defendant's mitigating evidence as presented at trial, but a clumsy approximation that risks producing profoundly inaccurate results. This Court's cases do not support such a practice. Once a factor is established as relevant to the sentencer's ultimate decision concerning the defendant's moral culpability, this Court has said that the weight of particular evidence in particular cases is for the sentencer – here, for the jury.[42]

Another part of the *Graham* test similarly attempts to minimize the importance of mitigating evidence in comparison to the jury's answers to the special issue questions. The court of appeals unfairly discounts the value of particular mitigating evidence by imposing a requirement of "elaboration" that finds no mooring in the Eighth Amendment. The

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[41] Virginia's capital sentencing statute likewise usefully illustrates the wrongheadedness of the Fifth Circuit's approach. The Virginia statute makes future dangerousness one of two aggravating factors, one of which must be established before death may be imposed. *See* Va. Code Ann. § 19.2-264.4C (Michie (1992)). Under the Fifth Circuit's reasoning, a defendant's youth could properly mitigate against a finding of this factor. However, the Virginia statute also includes a non-exclusive list of *mitigating* factors, including "the age of the defendant at the time of the commission of the capital offense," and the jury is instructed that it may base a life sentence on a finding of such a mitigating circumstance. Va. Code Ann. § 19.2-264.4B(v). The Virginia scheme therefore affords what the former Texas statute did not: a vehicle for considering particular evidence as independently mitigating, notwithstanding its relevance to the "future dangerousness" inquiry.

[42] *See, e.g., Eddings*, 455 U.S. at 114-115 ("The sentencer [in a capital case] may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration").

court of appeals' discussion of Mr. Graham's troubled family background reveals the inherent and impermissible subjectivity of such an analysis. The Fifth Circuit conceded that the testimony at sentencing established

> that Graham's mother was frequently hospitalized, commencing when he was approximately three [years old], with what [was] characterized without elaboration as a "nervous condition" or "mental illness."

Graham, 950 F.2d at 1033. The court acknowledged that "evidence of this general kind might well form part of a proper *Penry* presentation." *Id.* Although it recognized that this evidence bore on Mr. Graham's moral culpability, the court held that it presented no *Penry* error because "[t]here was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject." *Id.*[43] (emphasis in original). The court concluded that there was no "substantial evidence" that Graham's turbulent family background had left him impaired, and that "the evidence as a whole is simply not comparable to that in *Penry* or *Eddings*." *Id.*

This analysis trivializes factors already recognized by this Court as vital to an informed sentencing decision. Surely it is not necessary to "spell out" the fact that a childhood spent being shuttled from one relative to the next, deprived of a mother's nurturing and guidance by her hospitalization in an asylum, could have a destructive "effect" on a child. Similarly, a reasonable juror could certainly infer that the actions

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[43] In subsequent cases, the Fifth Circuit has expanded this part of the *Graham* test to require that the defendant must have presented expert testimony in support of obvious inferences from traditional mitigating evidence before he is entitled to relief under *Penry*. *See, e.g., Barnard v. Collins*, 958 F.2d at 638 (defendant, who introduced testimony that he had suffered serious head injuries from a beating with a tire iron, "did not introduce expert testimony relating to his psychological disorders," and "his mother's inexpert speculation concerning [his] mental condition" [she recounted that Barnard had sought psychiatric help and had been unpredictably moody] cannot establish a "*Penry*-type disability."

of a seventeen-year-old with such a background might reflect the emotional and psychological deficit he suffered as a result. These common sense observations demonstrate why the "elaboration" apparently required by *Graham* cannot be squared with the Eighth Amendment.

Graham dilutes *Penry's* strong guarantee of "full mitigating effect" into a weak promise to protect the "major mitigating thrust" of the defendant's evidence. In addition, the court of appeals fashioned numerous ancillary barriers to the full consideration of mitigating evidence. *Graham's* reluctance to permit the jury an informed "grant of mercy . . . based on [the defendant's] mitigating evidence" betrays a fundamental misunderstanding of *Penry* and the Eighth Amendment mandate it reflects. *Penry*, 492 U.S. at 326-327.

CONCLUSION

Mr. Graham's jury heard evidence which could well have convinced a reasonable juror that a sentence less than death was appropriate. Nevertheless, the former Texas capital sentencing statute confined the jury's deliberations such that the jurors could not express their "reasoned moral response" in answering the special issue questions. This preclusive effect violated Mr. Graham's Eighth Amendment right to an individualized determination of sentence. Petitioner Gary Graham thus respectfully prays that this Court reverse the judgment of

the United States Court of Appeals for the Fifth Circuit in his case and remand with directions to grant the writ of *habeas corpus*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 24 1992
OFFICE OF THE CLERK

No. 91-7580

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the special issues of the Texas capital-sentencing statute provided an adequate vehicle under the Eighth Amendment for consideration of Petitioner's youth, positive character traits and family background.

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RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, hereinafter "the Director," by and through the Attorney General of Texas, and files this Brief.

OPINION BELOW

The opinion of the *en banc* Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief to Petitioner, hereinafter "Graham," is reported at 950 F.2d 1009 and included in the Joint Appendix, hereinafter "JA," Volume II 543 *et seq.*

JURISDICTION

Graham has invoked the jurisdiction of this Court under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Graham bases his claims upon the eighth and fourteenth amendments to the United States Constitution. He challenges the application of Article 37.071 of the Texas Code of Criminal Procedure, which, as in effect at the time of Graham's trial, provided as follows:

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> * * * * *
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Graham was convicted in the 182nd Judicial District Court of Harris County, Texas, on October 28, 1981, of the capital offense of murder of Bobby Grant Lambert during the course of committing robbery. After a separate hearing on punishment, resulting in the jury's affirmative responses to the two special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981), a death sentence was assessed on October 30, 1981. Graham's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on June 12, 1984. *Graham v. State*, No. 68,916 (Tex. Crim. App. 1984). Certiorari review was not sought.

After an execution date was scheduled for July 30, 1987, Graham sought state habeas corpus relief. The execution date was rescheduled on three occasions, during which time a competency examination was conducted, the trial court held an evidentiary hearing, and state habeas relief was denied by the

Court of Criminal Appeals. *Ex parte Graham*, No. 17,568-01 (Tex. Crim. App. Feb. 19, 1988).

On February 23, 1988, two days prior to his scheduled execution date of February 25, 1988, Graham filed a petition for writ of habeas corpus and moved for a stay of execution in the United States District Court for the Southern District of Texas, Houston Division. The next day, the district court denied the writ and the stay application, but a panel of the Court of Appeals for the Fifth Circuit stayed Graham's execution. On August 31, 1988, the panel affirmed the district court's judgment. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir. 1988), JA II 506, but on July 3, 1989, this Court vacated the Fifth Circuit's judgment and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989).

On remand and after supplemental briefing, the panel, Judge Jolly dissenting, reversed the judgment of the district court on March 7, 1990, and remanded the case. *Graham v. Collins*, 896 F.2d 893 (5th Cir. March 7, 1990), JA II 525. On June 4, 1990, however, the court of appeals granted Respondent's suggestion for rehearing *en banc*. *Graham v. Collins*, 903 F.2d 1014 (5th Cir. 1990) (en banc), JA II 542. On January 3, 1992, the *en banc* court affirmed the district court's denial of habeas corpus relief. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), JA II 543. On June 8, 1992, the Court granted Graham's petition for writ of certiorari, JA II 612.

B. Statement of Facts

On May 13, 1981, Graham accosted Bobby Grant Lambert in the parking lot of a grocery store in Houston, Texas, and attempted to rob him. SR[1] XVII at 241-43, 326. When Lambert resisted, Graham put a pistol to Lambert's head. *Id.* at 327-30. Lambert dropped his groceries, and Graham shot him in

[1] "SR" refers to the state record of Graham's trial and appeal; "Tr." refers to the state transcript.

the chest. *Id.* at 332-36. As Graham fled, Lambert stumbled back into the grocery store, where he died. SR XVI 59-63.

At the punishment phase of trial, after Graham had been found guilty of the capital murder of Lambert, the state introduced evidence that Graham committed nine aggravated robberies against thirteen victims within one week of his commission of capital murder. Graham, armed with either a pistol or a shotgun, shot one person in the neck, pistol-whipped three others, stole five vehicles at gunpoint, and kidnapped and raped another victim.

On May 14, 1981, Graham entered Clinton Jones' van and pointed a pistol at Jones' head. Graham took Jones' watch and wallet, struck him with the pistol, shot him in the neck, and stole Jones' van. SR XIX 125, 304-09. That evening, Graham approached Linda Jennings and a friend at a carwash. *Id.* at 96-97. Graham entered the car, pointed a pistol at the pair, and drove off in their car. *Id.* at 106-10.

On May 15, 1981, Graham approached Yale Salsgiver in a parking lot and requested a ride. SR XX 363-64, 466. Once in Salsgiver's truck, Graham pulled a shotgun, and he and Salsgiver struggled for possession of it. *Id.* 363-64, 470-71. Salsgiver was able to escape, and Graham drove off in the truck. *Id.* At approximately 6:30 p.m. the same day, Graham approached Emory Dedman in his office's parking lot and requested a jumpstart for his van. SR XIX 79. As Dedman raised the hood of his car, Graham pulled a shotgun and forced Dedman into the van. He robbed Dedman of his watch, money and car keys, and drove off in Dedman's car. *Id.* at 80-88. Later that evening in yet another parking lot, Graham, again brandishing a shotgun, forced Richard Carter to kneel behind his car and robbed him of his wallet, money, tool box and hat while keeping the shotgun one inch from Carter's head. *Id.* at 274-85. Graham then struck Carter with the shotgun and left in his own car. Later that evening in the same parking lot, Carter again

encountered Graham, who still carried the shotgun. *Id.* at 289-92.

On May 18, 1981, Graham and an accomplice approached Ernest Doakes in an apartment complex parking lot, where Graham entered Doakes' car and took Doakes' money at gunpoint. SR XIX 250-56. Graham and his accomplice drove off in Doakes' car. *Id.* at 257. Also on May 18, Graham, armed with a pistol, approached Mohen Nemefolli and a friend in a hotel parking lot and demanded money. SR XX 334. When Nemefolli objected, Graham hit him with the pistol and then stuck it in Nemefolli's face, *id.* at 451-53, before absconding with a wallet, money and jewelry. *Id.* at 335, 454, 459.

On May 19, 1981, Graham approached Richard Sanford in a parking garage, where he forced Sanford at gunpoint into Sanford's car. SR XIX 229-31. Graham relieved Sanford of his watch, ring, wallet and money, and threatened to kill him, *id.* at 230-37, following which he ordered Sanford out of the car and frisked him, *id.* at 240-41, before fleeing. *Id.* at 242-43.

On May 20, 1981, Graham requested a ride from Lisa Blackburn, a cabdriver. SR XX 383-84. Once in the cab, Graham pulled a pistol and took Blackburn's wallet, money and personal property. *Id.* at 386-90. After threatening to rape Blackburn, Graham hit her in the face and forced her to drive to an abandoned apartment, *id.* at 392-93, where he fondled her genitalia, raped her vaginally and attempted to rape her anally. *Id.* at 394-403. Graham then forced Blackburn to drive to her apartment, where he gathered some of her property and instructed her to orally copulate him. *Id.* at 403-413. Graham fell asleep, and Blackburn took his pistol and called the police. *Id.* at 413-16.

The state also introduced testimony from a juvenile probation officer regarding Graham's bad reputation. SR XX 442-43.

The only testimony Graham produced at the punishment phase of trial was that of his stepfather and grandmother. Graham's stepfather, Joe Samby, testified that Graham, who lived and worked with his father, would visit his mother once or twice a week. SR XX 475-76. According to Samby, Graham was pleasant and cooperative, never fought with Samby and was never violent. *Id.* at 477-78. Graham loved and was very close to his mother, a "nervous type" who was currently on medication, and attempted to provide food and clothes for his two children. *Id.* at 478-79.

Graham's grandmother, Erma Chron, testified that Graham stayed with her intermittently, from ages three to twelve, because his mother was hospitalized numerous times for a nervous condition that Chron classified as mental illness. SR XX 481-83. While Graham was living with Chron, he attended church and school, was never violent and never possessed any weapons or caused any problems. *Id.* at 485-86.

At the conclusion of the punishment hearing and prior to the jury's deliberations on the punishment special issues, the trial court instructed the jury, *inter alia*, as follows:

> It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues", in this charge. The Court instructs you further, however, as follows:
>
> The mandatory punishment for capital murder is death or confinement in the penitentiary for life.
>
> The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before

any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the jury's deliberation.

If ten (10) jurors or more vote "No" as to any Special Issue, then the answer of the Jury shall be "No" to that issue, and the Foreman will so record the Jury's answer by signing his name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "No", then there shall be no answer for that Special Issue and the Foreman should not sign his name to any answer form for that Special Issue.

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

* * * * * *

Under the instructions herein given, it will not be proper for you, in determining the penalty to be assessed, to fix the same by lot, chance, or any system of averages, or any other method than by a full, fair and free exercise of the opinion of the individual jurors under the evidence submitted to you.

JA I 9-10, 11.

In closing argument, defense counsel urged Graham's youth as a basis for a life sentence:

> The first defense counsel's argument included the following:
>
> > "We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do

we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own. . . . Gary Graham is a young man. No doubt about it. . . . A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget. . . . I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given that opportunity. . . . Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face. He shot an individual and

he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe. . . ."

Graham's other counsel argued in a similar vein, stating:

" . . . there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish. . . . We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are

young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. . . . because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. . . ."

Graham, 950 F.2d at 1016, JA II 480-83; *see* 485-88, JA II 555-57.

SUMMARY OF ARGUMENT

There is no merit to Graham's claim that the Texas capital-sentencing statute operated to prevent his jury from giving mitigating effect to evidence he introduced at the punishment phase of his capital murder trial. The states are free, within constitutional limits, to channel the sentencer's consideration of mitigating evidence, and in so doing, minimize the possibility of arbitrariness and emotional responses to the evidence; including verdicts based on mere sympathy. The Texas scheme accomplishes this through special issues propounded to the jury at the punishment phase, an arguably more rational system than the "weighing" statutes employed by some states. Moreover, the constitutionality of the Texas scheme was confirmed in *Jurek v. Texas*, 428 U.S. 262 (1976), which this Court continues to cite approvingly and on which the court below relied heavily in rejecting Graham's constitutional challenge.

Graham's reliance on *Penry v. Lynaugh*, 492 U.S. 302 (1989), is misplaced. The *Penry* Court held that supplemental jury instructions were required to allow for Penry's evidence of mental retardation and childhood abuse to be given mitigating effect. In so holding, the Court found that this evidence could not be fully considered within the special issues and that Penry's retardation, because it was a permanent condition, was a two-edged sword that actually supported an affirmative answer to the future dangerousness inquiry of the second special issue. Graham's youth, conversely, is a transitory quality, the mitigating effect of which necessarily may be fully considered as it relates to future dangerousness.

The court of appeals faithfully adhered to both *Jurek* and *Penry* in rejecting Graham's constitutional challenge. That court correctly found that Graham's punishment-phase evidence could be fully considered within the Texas statutory questions, and Graham has offered nothing to demonstrate what qualities of his youth or other evidence could not be given mitigating effect in the Texas scheme.

Although Graham purports to rely on *Penry*, his claim is so extensive as to constitute a facial challenge to the Texas statute. If so construed, this claim would require that *Jurek* be overruled and is, therefore, a new claim that is barred by *Teague v. Lane*, 489 U.S. 288 (1989). Alternatively, this claim is meritless in light of the continued validity of *Jurek*, as the court of appeals found.

If construed as a claim for supplemental instructions, as in *Penry*, Graham's constitutional challenge likewise fails. Graham has neither identified the relevance of his mitigating evidence outside the scope of the special issues nor suggested what instructions might be given to cure the defect he believes to exist. No overt action of the trial court even arguably circumscribed consideration of Graham's evidence, and trial counsel did not request additional jury instructions. There is simply nothing in the record to remotely suggest that a

reasonable juror might have understood the absence of a supplemental instruction to preclude consideration of Graham's mitigating evidence.

ARGUMENT

THE TEXAS CAPITAL-SENTENCING STATUTE COMPORTS WITH THE REQUIREMENTS OF THE EIGHTH AMENDMENT.

A. The states are allowed wide latitude in guiding capital sentencing juries' consideration of mitigating evidence.

To pass constitutional muster, a state capital-sentencing scheme must perform two functions. First, it must suitably direct and limit a sentencing jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell and Stevens, JJ.). To accomplish this, the statute must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Second, the statute must allow the sentencer to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (original emphasis) (footnote omitted). *See also McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987) (summarizing the two concerns underlying the Court's capital sentencing precedents).

In the case at bar, Graham challenges the Texas statute with regard to the second function: the extent to which the sentencer is able to consider and give effect to relevant

mitigating evidence. According to Graham, his jury "was unable to voice the conclusion that [his] youth justified a life sentence . . . . , " Petitioner's Brief, hereinafter "PB," 28, and his "troubled family background," PB 32, and "extensive mitigating evidence of religious devotion, concern for his children, love for his family, and acts of kindness," PB 39, could not be given full mitigating effect under the Texas statutory special issues. As the court below correctly determined, however, this argument is foreclosed by prior decisions of this Court.

While it is true that a capital sentencing scheme may not prevent consideration of relevant mitigating evidence, it is also true that there is more than one way in which the eighth amendment may be satisfied. "The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice. Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). Thus, in the context of mitigating evidence, there is a "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making the sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. 484, 490 (1990). The states remain free to fashion and apply, within constitutional limits, statutes that channel the sentencer's exercise of discretion and "need not grant the jury the choice to make the sentencing decision according to its own whim or caprice." *Id.* at 493. *See also Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion) (states are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty").

Consistent with these teachings is the Court's admonition that the Constitution does not require that the sentencer in a capital case be allowed to dispense mercy. While evidence of

the defendant's character and background is properly taken into account in determining the appropriateness of a death sentence, it is permissible to instruct the jury that its verdict may not be founded on mere sympathy. *California v. Brown*, 479 U.S. 538, 542 (1987); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("it is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"). It was on this basis that the Court rejected a contention that an anti-sympathy instruction prevented full consideration of mitigating evidence. "This argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration." *Saffle*, 494 U.S. at 492. "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." *Id.* at 495.

The efforts of the Texas Legislature to achieve rationality and evenhandedness in capital sentencing are represented in Article 37.071 of the Texas Code of Criminal Procedure, the constitutionality of which was confirmed in *Jurek v. Texas*, 428 U.S. 262 (1976). Central to the *Jurek* Court's holding was the recognition that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 273-74. As the court below noted, 950 F.2d at 1027-28, JA II 584-86, this Court has continued to cite *Jurek* with approval on numerous occasions. *E.g.*, *Saffle*, 494 U.S. at 492; *Blystone*, 494 U.S. at 303. Indeed, even the dissent in *Blystone*, which believed the Pennsylvania statute did not adequately allow for individualized sentencing, opined that "the Texas statute upheld in *Jurek* does not deprive the jury of its ability to determine the propriety of the death sentence in a particular case." *Id.* at 321 (Brennan, J., dissenting). "Instead, by focusing on the deliberateness of the defendant's actions and his future

dangerousness, the [statutory punishment] questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability." *Id.*

That the Texas statute focuses a capital jury's punishment-phase deliberations on relevant sentencing concerns is not only constitutionally permissible, it is constitutionally appropriate. Texas has thereby attempted to assure that the sentence is a reasoned moral response rather than an emotional response to the evidence. By contrast, statutory schemes that allow the jury to give mitigating weight to aspects of the defendant's character or background--regardless of their relevance to the defendant's culpability or any other constitutionally recognized sentencing concern--create a risk that the jury's emotional response to the evidence will result in an arbitrary dispensation of mercy. In arguing that the jury must be able to weigh factors such as youth, Graham implicitly asserts a constitutional right to a weighing statute. The Constitution does not compel the states to employ such a scheme, however, and the decision of the Texas Legislature to provide an arguably more rational sentencing structure must be respected.

B. The Texas capital-sentencing statute complies with the individualized sentencing requirement of the eighth amendment in all but a narrow set of cases.

Among the substantive limitations imposed on the states by the eighth amendment is the requirement that the death penalty be assessed only after an individualized sentencing procedure, *Lockett v. Ohio*, 438 U.S. at 604-05, which requires that the jury give a reasoned moral response to relevant mitigating evidence of the defendant's character, background, and the circumstances of the offense during its punishment deliberations. *California v. Brown*, 479 U.S. at 545. Individualized capital sentencing is constitutionally required for the same reasons that it long has been required in non-capital

cases: society's interests in retribution, deterrence and rehabilitation. *See, e.g., Williams v. New York*, 337 U.S. 241, 248-49 n.13 (1949).

As the Court recognized in *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986),. however, not everything that a defendant introduces in mitigation of punishment is "relevant mitigating evidence." Rather, evidence is constitutionally relevant to the jury's punishment considerations when it pertains to constitutionally recognized mitigating factors. The Court's eighth amendment jurisprudence has recognized and defined two such factors that relate to society's interests in inflicting punishment: the defendant's personal moral culpability for the crime and his future dangerousness. The Constitution requires that the jury take into account the defendant's culpability because that relates to society's interest in exacting retribution for transgressing its laws. *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (heart of the retribution rationale is that sentence be directly related to the defendant's culpability). Similarly, whether a particular defendant probably will be a danger in the future is relevant to society's concern of rehabilitating criminal offenders. *Skipper v. South Carolina*, 476 U.S. at 5; *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983). Thus, in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), where the petitioner claimed that evidence of his good disciplinary record in prison reflected aspects of positive character traits that could not be given effect by the jury in answering the second punishment issue, the Court noted that such evidence encompassed nothing more "than those matters fully considered by the jury when it was asked to answer the second Special Issue," *i.e.*, his probable future dangerousness and his capacity for rehabilitation. 487 U.S. at 178 (plurality opinion).

Evidence of a defendant's character or background has mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character proffered in mitigation of punishment.

> [E]vidence about the defendant's background and character is relevant *because of the belief, long held by this society,* that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring) (first and second emphases added, third emphasis in original); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Unless the defendant can demonstrate some connection between his crime and his proffered evidence, he does not show that he is less culpable than any other person. Without a nexus between the crime and the defendant's evidence of his reduced culpability, the evidence can provide only a basis for the jury to exercise sympathy for the defendant, and a decision based on only sympathy cannot be a reasoned moral response to the defendant's culpability. Conversely, if such a nexus is demonstated, the jury's punishment verdict will be a reasoned moral response to the evidence.

Finally, although cases such as *Lockett* govern the factors the jury must be permitted to consider in making its sentencing decision, the Court never has promulgated "rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. at 490. "States are free to structure and shape consideration of mitigating evidence `in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990), quoting *Franklin v. Lynaugh*, 487 U.S. at 181 (plurality opinion). A state's capital-sentencing statute complies with constitutional requirements if it

provides the jury with *a* vehicle for considering mitigating evidence. *Boyde v. California*, 494 U. S. at 380-84 & n.5;[2] *Saffle v. Parks*, 494 U.S. at 491-92. Thus, a death sentence should not be set aside unless there is a "reasonable probability" that the jury would have interpreted instructions to preclude effective consideration of the mitigating force of the defendant's evidence, as that evidence was proffered at trial. *Boyde v. California*, 494 U.S. at 380-84 & n.5. A defendant is entitled to proffer any aspect of his background, character, or offense in mitigation of a death sentence, but the eighth amendment is violated only if, under a particular scheme, evidence that is probative of a reduced culpability or capacity for rehabilitation cannot result in a sentence less than death. Following *Boyde* and *Saffle*, it is clear that the potential for unconstitutional application of Texas' scheme identified in *Penry* is limited to those circumstances in which the statutory issues so limit the jury's deliberations that there exists a reasonable probability that relevant mitigating evidence could not establish a reasonable doubt as to an affirmative response to those issues.

At the time of Graham's trial, Texas allowed juries in capital murder trials to consider the defendant's personal moral culpability and future dangerousness by having the jury answer

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[2] For example, in *Boyde*, the defendant urged that evidence he won a dance contest in prison demonstrated an absence of future dangerousness--a factor that Boyde argued could not be given effect under California's death penalty statute. As a threshold matter, the Court refused to consider Boyde's future dangerousness argument, because he did not proffer the evidence for that purpose at the time of trial. *Boyde v. California*, 494 U.S. at 382 n.5. Rather, Boyde presented the evidence as an aspect of his good character, and the Court held that the jury could give effect to such evidence insofar as it demonstrated the crime to be an aberration from an otherwise good character. *Id.* Despite the fact that the jury did not have what was arguably the most direct vehicle for giving mitigating effect to Boyde's evidence--a future dangerousness question--and despite the fact that the jury could not have given independent mitigating effect to this evidence if it also believed that Boyde's crime was not an aberration, the Court found no eighth amendment violation because the jury had *a* fair vehicle for giving effect to that evidence.

two (or, if raised by the evidence, three) questions at the punishment phase.[3] The questions, particularly the second one concerning the defendant's probable future dangerousness, have been interpreted as allowing the defendant to bring before the jury "whatever mitigating circumstances he may be able to show." *Jurek*, 428 U.S. at 272. Under the Texas scheme, the jury can given mitigating effect to any evidence that, if credited and given sufficient weight, logically can raise a reasonable doubt that any special issue should be answered affirmatively.

In *Penry v. Lynaugh*, the Court recognized that certain kinds of evidence offered by the defendant cannot be given mitigating effect in the Texas statutory scheme without supplemental jury instructions. There, the Court found that evidence of Penry's mental retardation and childhood abuse possessed relevance to his culpability outside the scope of the special issues. In such cases, to ensure that the defendant receives the individualized sentencing procedure required by the eighth amendment, the trial court must, upon request, instruct the jury in a manner that allows it to give mitigating effect to the evidence. 492 U.S. at 320-21.

Penry's holding is a limited one, as is obvious from the Court's analysis. Penry's mental retardation, exacerbated by the severe abuse he received as a child, was relevant to both his moral culpability and his capacity for rehabilitation. It was relevant to his culpability because it affected his ability to control his impulses and evaluate the consequences of his behavior, and it was relevant to his potential for rehabilitation because his inability to learn from his mistakes was a permanent condition that would not diminish with time. While recognizing that Penry's evidence was mitigating with respect to the first special

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[3] The text of the punishment questions is set out at pages 2-3, *supra*. If all of the questions submitted to the jury are answered in the affirmative, the defendant is sentenced to death. If any one is answered negatively, or not answered, the defendant is sentenced to life imprisonment.

issue on deliberateness, the Court found that it also had relevance to his culpability beyond the scope of the special issues. 492 U.S. at 324. Inasmuch as Penry's inability to control his impulses was relevant to whether he acted deliberately, it necessarily was the other aspect of his retardation--his inability to learn from his mistakes--that exceeded the scope of the first special issue. Moreover, it was precisely this latter aspect of Penry's mental retardation that the Court viewed as dual-edged, because it indicated future dangerousness and, thus, was relevant to the second issue only as an aggravating factor. *Id.* Given the nature of Penry's evidence, the jury had no vehicle through which to give a reasoned moral response to the evidence, and the proceedings deprived Penry of individualized sentencing.

Following *Penry*, numerous death-sentenced inmates have asserted that evidence they introduced at their trials also comes within *Penry*'s ambit. Both the Texas Court of Criminal Appeals and the lower federal courts have looked for guidance not only to the decision in *Penry* but also to this Court's subsequent decisions, which continue to cite *Jurek* with approval, persuasive evidence of the validity of the Texas statute with respect to a wide range of mitigating factors. Accordingly, the courts have affirmed convictions and death sentences in cases in which it is clear that the jury was able to give effect to the mitigating evidence introduced by the defendant.[4] On the other hand, where the defendant's evidence was either irrelevant to the punishment issues or had relevance beyond the scope of the issues, the courts have not hesitated to vacate the resulting death sentences.[5] In every case, the courts

[4] *E.g., Cordova v. Collins*, 953 F.2d 167 (5th Cir.), *cert. and stay denied*, ___ U.S. ___, 112 S. Ct. 959 (1992) (evidence of intoxication at the time of offense); *Black v. State*, 816 S.W.2d 350 (Tex.Crim.App. 1991) (evidence of good character); *Ex parte Ellis*, 810 S.W.2d 208 (Tex.Crim.App. 1991) (evidence of drug and alcohol intoxication).

[5] *E.g., Mayo v. Collins*, 893 F.2d 683 (5th Cir.), *modified*, 920 F.2d 251 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 95 (1991); *Clark v. Collins*, No. H-88-1296 (SD Tex. 1990), *appeal docketed*, No. 91-

have unerringly followed the *Penry* Court's reasoning to determine whether the punishment hearing comported with the constitutional requirement of individualized sentencing.

C. The court below correctly applied this Court's jurisprudence in rejecting Graham's constitutional challenge to the Texas statute.

The court below faithfully honored this Court's capital-sentencing precedents in deciding the constitutional issue presented by this case. Adhering to the rationale of *Jurek* and applying the lessons of *Franklin* and *Penry*, the court of appeals analyzed Graham's punishment-phase evidence and concluded that "not only Graham's youth but also his other mitigating evidence could adequately be taken into account in answering the special issues, particularly the second." 950 F.2d at 1033, JA II 600-01. The court below, not surprisingly, found considerable guidance in the striking similarities between the facts of *Jurek* and those of the instant case.

With regard to Graham's claim that the Texas special issues do not permit consideration of his youth as a mitigating factor, the court of appeals held that *Jurek* is controlling.

> The Supreme Court's opinion in *Jurek* affirmatively reflects that the defendant was "22 years old at the time" of the offense,

2026 (5th Cir. January 15, 1991); *Ex parte Williams*, ___ S.W.2d ___, No. 71,403 (Tex.Crim.App. June 24, 1992); *Ex parte Sterling*, No. 71,385 (Tex.Crim.App. April 29, 1992); *Ex parte Modden*, No. 71,312 (Tex.Crim.App. February 12, 1992); *Ex parte Bell*, No. 70,946 (Tex.Crim.App. November 6, 1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex.Crim.App. 1991); *Ramirez v. State*, 815 S.W.2d 636 (Tex.Crim.App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex.Crim.App. 1991); *Gribble v. State*, 808 S.W.2d 65 (Tex.Crim.App. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2856 (1991). In each of these cases, the defendant introduced evidence of physical and/or sexual abuse as a child, arrested mental or emotional devlopment, mental retardation, and/or brain damage.

> and, in upholding the death sentence and the Texas scheme, quotes the portion of the Court of Criminal Appeals' opinion stating that in answering the second issue the jury can consider "`the age of the defendant.'" *Jurek* thus squarely answers the question of whether "youth" is adequately taken into account by the second special issue. . . . Moreover, *Penry* itself involved a twenty-two-year-old defendant, and the opinion contains no suggestion whatever that this fact was one which could not be adequately taken into account in answering the statutory special issues.

950 F.2d at 1030, JA II 591-92 (citations and footnote omitted).[6]

Similarly, the Fifth Circuit held that Graham's other punishment-phase evidence could be considered and given effect through the special issues. The court found that Graham's "rather mild evidence of normal, good--though not exceptionally good-- character,"[7] *id.* at 1032, JA II 597-98, did not have

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[6] In finding that "youth" includes defendants who were twenty-two years old at the time of their offenses, the court of appeals thus agreed with the Texas Court of Criminal Appeals, which has described a 23-year-old defendant's youth as having mitigating quality. *See Lackey v. State*, 819 S.W.2d 111, 129 (Tex. Crim. App. 1991), cited in *Graham*, 950 F.2d at 1030 n.25.

[7] The court below correctly characterized Graham's character evidence as "mild" in that it consisted of only conclusory statements that he was an obedient, mild-mannered child who performed household chores and tried to support the two children he had sired out of wedlock by the age of fifteen. Moreover, this evidence was less than compelling in that it consisted entirely of the testimony of close relatives, "witnesses who had a definite interest in seeing that [Graham] was not sentenced to death." *Parker v. Dugger*, 498 U.S. ___, ___, 111 S. Ct. 731, 746 (1991) (White, J., dissenting).

substantial mitigating value apart from their obvious relevance to the special issues.

With regard to Graham's character evidence, the court reasoned as follows:

> It appears to us that the principal mitigating thrust of all this evidence is to suggest that the events of May 13-20 were aberrational and atypical of Graham's true character and that he thus had potential for rehabilitation, and would not be a continuing threat to society. As such, the mitigating force of this evidence can adequately be given effect under the second special issue.
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> This evidence does not seem different in kind from that before the Supreme Court in *Jurek*, where the defendant's father testified that "the petitioner had always been steadily employed since he had left school and that he contributed to his family's support." *Id.* at 2954. Nor does this sort of character evidence seem other than wholly typical of what might be expected in a vast number of cases. As noted, were evidence of this kind held to invoke *Penry*, then *Jurek* and the Texas statutory scheme would for all practical purposes be wholly eviscerated.

Id. at 1032-33, JA II 598 (footnote omitted).

The court also found that Graham's evidence of his upbringing--that his mother "was hospitalized, commencing when he was approximately three, with . . . a `nervous condition' or `mental illness,'" *id.* at 1033, JA II 600--did not require a special jury instruction.

> There was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject. Further, the entire context in which this testimony was presented, from the point of view both of Chron's testimony as a whole and of all the defense evidence at the sentencing hearing, suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like, or that he had any mental or psychological problems. The entire thrust of the defense evidence, both from Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems" . . . .

Id., quoting *Penry*, 492 U.S. at 319.[8]

Graham challenges the analysis of the court below on several grounds, none of which is persuasive. First, he makes much of the fact that the Texas Legislature has seen fit to amend the statute. PB 19-20. The amendment upon which Graham

[8] The insubstantiality of Graham's evidence of a troubled childhood is readily apparent. For instance, Johnny Paul Penry's mother "had frequently beaten him over the head with a belt when he was a child. Penry was also routinely locked in his room without access to a toilet for long periods of time. As a youngster, Penry was in and out of a number of state schools and hospitals . . . . " *Penry*, 492 U.S. at 309. Similarly, Monty Lee Eddings had "a turbulent family history, of beatings by a harsh father, and of severe emotional disturbances . . . . ". *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). *See also Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (describing defendant's mitigating evidence of a troubled childhood, including a history of inhaling gasoline, a wandering mind, an impoverished family and a father who died of cancer).

relies might be accurately characterized as a legislative overreaction to the concerns the Court voiced in *Penry*. That the legislature believed an amendment was appropriate does not prove that the amendment was necessary or that the former statute was invalid. This point is illustrated by *Boyde v. California*, where the Court upheld a statute that had been amended since the petitioner's trial. 494 U.S. at 374 n.2.

Graham also attaches significance to the Oregon Supreme Court's overruling of a similar statute. PB 20-21. Regardless of the result reached by that court, however, this Court is the final arbiter of federal constitutional issues. If the decision of the Oregon court is incorrect, as the Director believes, it would not be the first time that that court has misapplied federal constitutional law. *See, e.g., Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982) (certiorari granted because "that court took an overly expansive view of the Double Jeopardy Clause"); *Oregon v. Matthiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] too broadly"). That a state appellate court reached a different result in a similar case is of no significance to the constitutional issue before the Court in the case at bar.

In addition, Graham complains that the trial court's definition of "criminal acts of violence" included some relatively minor offenses. PB 8. Thus, Graham argues, "[a]ny reasonable juror would have associated such acts exclusively with juveniles, and hence would have concluded that . . . Graham's youth required a `yes' answer to the second special issue." PB 30 n.30. There are three answers to this complaint, the first being that the trial court's comments that Graham deems objectionable were but part of a broad description of "criminal acts of violence" that the court and the attorneys discussed with the venire members during voir dire.[9] It is highly unlikely, therefore, that the jury

[9] *See, e.g.*, SR III 52 ("hit him, cut him, shoot him, or rob him"), *id.* at 106 ("pull a knife and try to cut off someone's ear . . . pull a gun"), *id.*

was misled by the definitions to which Graham refers. Second, the statutory terms at issue relate to matters that might support affirmative answers to the special issues, *i.e.*, "aggravating" factors that have no logical connection to the inquiry as to whether a rational jury could give effect to Graham's "mitigating" evidence. Third, and of greatest import, is that the jury had before it extensive testimony of a number of serious violent crimes Graham had committed. Thus, regardless how much significance might be attached to the trial court's remarks in the abstract, they could not have affected the fairness of Graham's sentencing hearing. *Boyde* teaches that a punishment-phase instruction will pass constitutional muster if there is no reasonable likelihood that the jury understood the challenged instruction to prevent the consideration of relevant mitigating evidence. 494 U.S. at 386. Under *Boyde*, Graham's trial was constitutionally sound because no juror could have taken the absence of an instruction--the substance of which Graham has yet to suggest--to preclude consideration of his punishment-phase evidence. *See, generally, Henderson v. Kibbe*, 431 U.S. 145, 156 (1977) ("[T]he respondent's burden is especially heavy because no erroneous instruction was given . . . An omission . . . is less likely to be prejudicial than a misstatement of the law").

These matters aside, the initial problem with Graham's substantive argument is that he does not identify the mitigating value of his youth outside its obvious relevance to the special issues. He asserts that "youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a death sentence is inappropriate in a given case." PB 28. The Director does not dispute this statement, generally, and does not disagree that there are qualities of youth to which society ascribes mitigating value. Nowhere, however, does Graham

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at 150 ("everything from slashing tires and property, up to robbery or murder"), SR IV 233 ("slapping somebody . . . murder or aggravated robbery"), *id.* at 250 ("where somebody takes a life"), *id.* at 309 ("shooting at someone . . . aggravated assault, robbery, aggravated robbery or murder").

specify just what characteristics of his age could not be evaluated within the Texas statutory framework. Much like the emperor's new clothes, Graham's argument exists in word only.

In addition to failing to identify the aspects of his youth that could not be considered within the special issues, Graham also fails to state what action the trial court might have taken to remedy the constitutional defect he perceives. While, in relying on *Penry*, Graham necessarily argues that his jury should have received additional instructions on mitigating evidence, his claim is in fact so broad that it is nothing less than a challenge to the facial validity of the Texas statute. As the court below observed, "to say that the second special issue is . . . inadequate to take youth into account, is necessarily to also say that it is inadequate to take into account any other mitigating force which is not wholly coterminous and synonymous with future dangerousness." 950 F.2d at 1031 n.27, JA II 595 n.27. Thus, to sustain Graham's claim, this Court must overrule *Jurek*. *Id.* As discussed, *supra*, at 16-17, 22, however, the Court has repeatedly reaffirmed the validity of *Jurek*.[10]

In any event, the trial court's punishment-phase instructions in no way circumscribed consideration of Graham's youth as a mitigating factor. The court told the jury that it was to consider "all of the evidence" admitted at both phases of trial and that its verdict could be reached only "by a full, fair and free exercise of the opinion of the individual jurors under the evidence submitted to you." JA I 10-11. In addition, the court instructed the jury that unanimous affirmative responses to the

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[10] If Graham is in fact asking that *Jurek* be overruled, his claim is a new claim that is barred by the rule of *Teague v. Lane*, 489 U.S. 288 (1989). While the Court held that *Teague* did not bar consideration of Penry's claim, 492 U.S. at 315, that claim did not require that *Jurek* be overruled. Similarly, if Graham is asserting the existence of a constitutional defect that can be cured by supplemental instructions, his claim likewise is not barred; conversely, if sustaining Graham's claim would necessarily require that *Jurek* be overruled, it is barred by *Teague*.

issues were required before a "yes" answer could be recorded on the verdict form. JA I 9-10. Thus, a single "no" vote would result in a life sentence. *See discussion, supra*, at 21 n.3. The sentencing proceeding at Graham's trial stands in stark contrast to the unconstitutional scheme the Court struck down in *McKoy v. North Carolina*, 494 U.S. 433, 439 (1990), which "allows one holdout juror to prevent the others from giving effect to [mitigating] evidence . . . . "

Graham's trial counsel did not request a special instruction, and "[i]n marked contrast to *Penry*, there is here nothing to suggest that defense counsel desired to have the mitigating force of youth presented or considered in any other manner than as a basis for a negative answer to the second special issue." 950 F.2d at 1031-32, JA II 595 (footnote omitted).[11] Thus, here, as in *Boyde*, 494 U.S. at 384, counsel's failure to lodge a trial objection "certainly is relevant to deciding how a jury would understand" the court's instructions. *See also Franklin v. Lynaugh*, 487 U.S. at 186 (O'Connor, J., concurring) (finding that prison disciplinary record constituted good character evidence that could be considered under the second special issue because "petitioner did not suggest [at trial] that his lack of disciplinary violations revealed anything more positive about his character than that"); *Wainwright v. Witt*, 469 U.S. 412, 431 n.11 (1985) (in deciding a claim of jury selection error, "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering"). In sum, the trial record in no manner suggests that a reasonable juror might have understood the absence of an instruction to prevent consideration of relevant mitigating evidence.

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[11] It is ironic that Graham's only trial objection to the Texas sentencing scheme was a pretrial motion arguing that the statute vested juries with unconstitutionally broad discretion. JA 39 *et seq.*; *see* 950 F.2d at 1017 n.11, 1032 n.28, JA I 39, *et seq.*; *see* JA II 559 n.11, 595 n.28.

In attempting to fit his situation within the rule of *Penry*, Graham makes several statements that are simply untenable. First, he asserts that "youth supports an affirmative answer to the second special issue because the jury must consider a longer period of time during which the young defendant may commit some violent act, than if he were a mature adult." PB 30.[12] Both common sense and this Court's decisions indicate just the contrary. As Graham himself argues, "[y]oung people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral judgments *than are their elders*." PB 26 (emphasis added). Put another way, youth "*is a time and condition of life* when a person may be most susceptible to influence and psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (footnote omitted) (emphasis added). It necessarily follows, then, that the disabilities of youth diminish and disappear with the passage of time.[13] Thus, were a juror

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[12] Graham's assertion rests on the faulty premise that a jury's answer to the second special issue turns on how many more years a defendant may live rather than the likelihood, *i.e.*, "probability" that he will engage in violent acts in the future. The Court's discussions of the future dangerousness inquiry lend no support to Graham's assumption. *See Skipper v. South Carolina*, 476 U.S. at 5; *Barefoot v. Estelle*, 463 U.S. at 902-03.

[13] *See, e.g.*, Maria M. Homan, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 Brook. L. Rev. 767, 778, 781 (1987) (adolescents' inability to understand society because of their youth and absence of education result in a violent response to their environment triggered by untempered emotion; there is evidence that juvenile propensity toward criminal activity diminishes with age); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. Rev. 503, 508 & n.13, 538 (1984) (a child may have difficulty choosing among options, but an adult will not; children usually are not considered to be culpable because of their age, but this changes once the child becomes an adult); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense. Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. Rev. 821, 911 (1988) (the progression from child to adult in maturity and experiencing time is the same as the progression from children

convinced that Graham's moral culpability was reduced because his crime was in some way attributable to his youth, that juror necessarily would reach the logical conclusion that Graham's propensity for violence would diminish as he grew older. This core attribute of the quality of youth underscores the correctness of the court of appeals' holding:

> [Y]outh is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory. Therefore, whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to society. Thus, the second special issue affords an adequate

to adults in developing responsibility for making blameworthy choices); Alison R. Faltersack, *Stanford v. Kentucky, The Minimum Age for the Maximum Penalty--Death*, 23 J. Marshall L. Rev. 453, 466 & n.94 (1990) (many believe these disabilities of youth begin to transform into a self-reliant responsible age of adulthood during early adolescence, including the ability to plan for the future while becoming accountable to society); Lawrence A. Vanore, *The Decency of Capital Punishment for Minors; Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. J. 757, 779 (1986) (when they become adults, minors obtain more privileges as well as responsibility and culpability in matters of law); Glenn M. Bieler, *Death be Not Proud: A Note on Juvenile Delinquent Punishment*, 7 N.Y.L. Sch. J. Hum. Rts. 179 (1990) (adolescence is the period of physical and psychological development from the onset of puberty to maturity, the transitional period between childhood and adulthood, and a stage of life lasting roughly from age 12 to age 19).

> vehicle by which the jury can give effect to the mitigating aspect of youth.

950 F.2d at 1031, JA II 593-94 (citation omitted). Other than his self-serving assertion, Graham offers nothing to show that youth is the sort of "two-edged sword" that the Court found Penry's mental retardation to be.

Graham next makes the incredible statement that "[t]he focus of the second special issue, on predicting future behavior, rather than assessing present culpability, thus precluded the jury from considering and giving effect to" his youth as a mitigating factor. PB 30. In so arguing, Graham ignores the Texas statutory elements of the offense of capital murder, which the state must prove beyond a reasonable doubt and which certainly focus on the defendant's present culpability in narrowing the class of persons eligible for the death penalty. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988) (describing how the Texas statute functions in a constitutionally sound manner). He further ignores the deliberateness inquiry of the first special issue, which also clearly addresses the defendant's present culpability. That the statute goes beyond constitutional requirements and requires the state to prove a probability of future dangerousness actually inures to the benefit of capital defendants, particularly youthful offenders such as Graham.

Moreover, almost two decades of experience with the Texas capital murder statute undermines Graham's argument. There are 450 Texas inmates whose juries assessed death sentences and who either have been executed, are on Death Row, or have had their death sentences reformed or commuted to life sentences; there are 161[14] inmates convicted of capital

[14] There are, in fact, 194 Texas inmates with capital murder convictions whose juries assessed life sentences. Five inmates with life sentences committed their offenses after August 31, 1991, in which case the state had discretion not to seek the death penalty. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 1 (Vernon Supp. 1992). The Director has not been able to ascertain whether the state waived the death penalty in those cases, and

murder whose juries assessed life sentences. *See* Affidavit of S. O. Woods, attached as an appendix to this brief. Of the prisoners aged 17-23[15] at the time of their offenses, 200 received death sentences and 79 received life sentences, and of the prisoners over age 23 at the time of their offenses, 250 received death sentences and 81 received life sentences. *Id.* Thus, 26.4% of all defendants convicted under the Texas capital murder statute, 28.4% of all youthful offenders and 24.7% of all non-youthful offenders with capital murder convictions received life sentences. Thus, there is a 15% greater relative probability that a youthful offender will receive a life sentence than will a non-youthful offender. These numbers hardly support Graham's assertion that the Texas capital sentencing statute operates unfairly to prevent consideration of mitigating evidence, including youth. *Cf. Sochor v. Florida*, ___ U.S. ___, 112 S. Ct. 2114, 2129 (1992) (Stevens, J., concurring in part and dissenting in part) (in capital cases reviewed by Florida Supreme Court between 1980 and 1991, the jury recommended life in only 19%).[16]

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they are not included in the above calculations. Also not included are 28 inmates who were under 17 when they committed their offenses and, therefore, could not have been sentenced to death. TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1992).

15 Twenty-three is the oldest age the courts have found to be youthful for purposes of mitigation of capital punishment. *See Lackey v. State, cited, supra,* at 24 n.6.

16 While, of those defendants convicted of capital murder, almost three-fourths received the death penalty, it is important to bear in mind that in Texas not all defendants who are charged with murder are exposed to the death penalty. The Texas statute narrows the class of those eligible for a death sentence by requiring the state to prove beyond a reasonable doubt, at the guilt-innocence phase of trial, the statutory elements of the offense of capital murder. Thus, the number of inmates referred to in the affidavit necessarily excludes all defendants who were charged with capital murder but pled guilty to a lesser offense or were found by a jury to be not guilty of capital murder. In Florida, by contrast, no narrowing takes place at the guilt-innocence phase of trial, and a defendant's eligibility for the death

The court below also reasoned, in conformity with this Court's eighth amendment jurisprudence, that Graham's evidence of good character could be considered within the special issues. In *Skipper v. South Carolina*, for instance, the Court reversed because the petitioner had not been allowed to introduce evidence in mitigation of punishment regarding his good behavior while in prison. The Court nonetheless commented that "not all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating." 476 U.S. at 7 n.2. *Skipper* thus stands for the proposition that only evidence that is relevant to the jury's sentencing decision must be admitted. *Skipper* is of particular relevance to the case at bar, in which *Graham* merely asserts, but does not demonstrate, the mitigating quality of his evidence beyond the scope of the special issues.

Similarly, in *Franklin v. Lynaugh*, the Court found that evidence of Franklin's good conduct while incarcerated was of such a nature that it was relevant to the second special issue.

> The only mitigating evidence introduced by petitioner was the stipulation that he had no record of disciplinary violations while in prison. It is undisputed that the jury was free to give mitigating effect to this evidence in answering the special verdict question regarding future dangerousness. While it is true that the jury was prevented from giving mitigating effect to the stipulation to the extent that it demonstrated positive character traits other than the ability to exist in prison without endangering jailers or fellow inmates, that limitation has no practical or constitutional significance in my view

---

penalty is determined exclusively by whether an aggravating factor is found at the punishment phase. FLA. STAT. § 921.141 (1991); *see Sochor v. Florida*, 112 S. Ct. at 2117.

> because the stipulation had no relevance to any other aspect of petitioner's character.

487 U.S. at 185 (O'Connor, J., concurring). Where, as here, the special issues provided for plenary consideration of Graham's good character evidence, his claim must fail under the reasoning of Justice O'Connor's concurrence in *Franklin*. *See also Boyde*, 494 U.S. at 382-83 n.5 (that defendant won a dance contest while in prison constituted evidence of good character that could be considered under the California sentencing scheme).

The Fifth Circuit also correctly rejected the notion that Graham's upbringing somehow reduced his moral culpability. As that court observed, Graham made no showing that his actions were "attributable" to his disadvantaged youth. As discussed, *supra*, at 19, *Penry* requires that a defendant show a nexus between his criminal acts and his disadvantaged background in order to rely on the latter as mitigating evidence. The Fifth Circuit's opinion is faithful to the rationale of *Penry*.

Graham also quibbles with the Fifth Circuit's requirement that to prevail on a *Penry* claim, a capital defendant must demonstrate that the major mitigating thrust of his evidence exceeds the scope of the special issues. According to Graham, this standard constitutes an "elaborate system," PB 41, the "intricacy" of which "compels a complex two-part inquiry . . . ." PB 40. In fact, however, the court below reasoned in harmony with this Court's eighth amendment jurisprudence in rejecting Graham's claim. The court of appeals' analysis of which Graham complains is the same as that employed by Justice O'Connor in both *Franklin* and *Penry*, *i.e.*, whether the evidence to which the defendant ascribes mitigating value is such that it can be given mitigating effect within the framework of the Texas statute. The court of appeals' use of the term "major mitigating thrust" is nothing more than a shorthand phrase to identify the purpose for which the evidence was offered. As discussed, *supra*, at 31, both this Court's decisions and Graham's brief are replete with references to youth as a transitory condition, the mitigating

qualities of which dissipate as the defendant grows older. Thus, evidence of Graham's youth necessarily was susceptible of full consideration as it related to the future dangerousness issue, as evidenced by defense counsel's closing argument, *supra*, at 9-12, which emphasized Graham's capacity for personal growth and transformation to a more peaceful individual.

Graham also takes issue with what he characterizes as the court of appeals' "'permanence' requirement," PB 43, and the "requirement of 'elaboration'." PB 45. His arguments are wholly specious. As discussed, *supra*, at 21-22, a major concern of the *Penry* Court was the permanence of the defendant's mental retardation and how it supported an affirmative answer to the future dangerousness inquiry. Graham's youth obviously is of a different character, and he cannot in good faith argue otherwise. The court of appeals' "elaboration" requirement likewise constitutes nothing more than recognition that the relevance of mitigating evidence can be discerned from the purpose for which it was offered, an unremarkable proposition to which the *Boyde* Court adverted. 494 U.S. at 384, as did Justice O'Connor in her *Franklin* concurrence. 487 U.S. at 186.

Finally, Graham complains that "the court below erred in its insistence that [his] youth must somehow explain or excuse the capital offense in order to be constitutionally mitigating." PB 43 n.38. The hollowness of this argument is apparent from the only authority Graham cites to support it: *Payne v. Tennessee*, 501 U.S. ___, 111 S. Ct. 2597 (1991). That case does not stand for the proposition for which it is cited, and the quoted language does not appear on the pages to which Graham refers. The reasoning of the court below is consistent with *Penry* and other decisions of this Court.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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APPENDIX

AFFIDAVIT

My name is S. O. Woods. I am the Chairman of the State Classification Commission of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). In that capacity, I am the custodian of the records of all inmates in the TDCJ-ID. I have reviewed those records, and on July 30, 1992, they revealed the following:

There have been 50 executions carried out for capital murders committed after June 14, 1973. There are 364 inmates who have been convicted of capital murder for offenses committed after June 14, 1973, and are under sentence of death; there are 36 inmates whose juries returned death sentences that subsequently were reformed to life sentences by court action or commuted to life sentences by the Governor. The records of these 450 inmates reveal the following:

Age on Date of Offense	Number of Inmates	Age on Date of Offense	Number of Inmates
17	15	35	13
18	19	36	11
19	30	37	7
20	33	38	7
21	32	39	5
22	38	40	5
23	33	41	1
24	34	42	3
25	23	43	3
26	16	44	3
27	24	45	1
28	17	46	1
29	17	47	2
30	12	49	1

31	14	50	2
32	10	51	1
33	10	52	1
34	6		

Total 450

There are 194 inmates who have been convicted of capital murder for offenses committed after June 14, 1973, and whose juries returned sentences of life imprisonment. Twenty-eight of those inmates were under the age of seventeen when they committed their offenses, and five committed their offenses after August 31, 1991. The records of the remaining 161 inmates reveal the following:

Age on Date of Offense	**Number of Inmates**	**Age on Date of Offense**	**Number of Inmates**
17	11	32	2
18	9	33	2
19	13	34	4
20	15	35	2
21	12	36	1
22	11	37	2
23	8	38	4
24	5	39	1
25	17	40	1
26	5	41	3
27	3	42	1
28	11	43	5
29	2	47	1
30	5	52	1
31	4		

Total 161

I have read the above and declare under penalty that it is true and correct.

/S_____
S. O. WOODS
Chairman, State Classification Commission
Texas Department of Criminal Justice
Institutional Division

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 1992.

/S_____
NOTARY PUBLIC in and for
The State of Texas
My Commission Expires March 3, 1994

Supreme Court, U.S.
FILED
SEP 23 1992
OFFICE OF THE CLERK

No. 91-7580

In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

A seventeen-year-old capital defendant introduced mitigating evidence of his youth, acts of kindness, religious observance, redeeming character traits, and troubled family background. The sentencing jury was permitted by statute to answer only three questions:

> whether he acted "deliberately" in committing the offense,
>
> whether he might be dangerous in the future, and
>
> whether he acted unreasonably in response to any provocation by the deceased.

The jury was afforded no other vehicle for considering his mitigating evidence. Does this sentencing procedure satisfy the Eighth and Fourteenth Amendments?

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SUMMARY OF ARGUMENT

Although conceding the underlying Eighth Amendment requirement that Mr. Graham's jury remain free to fully consider and give effect to all aspects of his mitigating evidence,[1] Respondent ignores that principle when applying *Penry v. Lynaugh*, 492 U.S. 302 (1989), to Mr. Graham's claim. To support its departure from settled law, Respondent mischaracterizes this Court's Eighth Amendment jurisprudence. Finally, although Respondent assisted the Texas legislature in that branch's honest attempt to achieve the fairness mandated by the Constitution and manifest in other states' statutes, it now denigrates that endeavor. Instead, Respondent supports an outdated statute that has already been shown to prevent jurors in cases like Mr. Graham's from exercising their reasoned moral response to punishment evidence.

These actions demonstrate that Respondent stands alone – against other branches of government, against precedent, against common sense, and against the Constitution – in its attempt to preclude Mr. Graham's jury from considering his compelling mitigating evidence of youth, troubled and chaotic upbringing, religious devotion, good deeds, and positive character traits in determining whether he should live or die.

---

[1] Respondent recognizes that a constitutional death penalty statute must "allow the sentencer to consider *'as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " Respondent's Brief (hereinafter R.B.) at 14 (citation omitted) (emphasis in original). See also R.B. at 21.

ARGUMENT

I.

RESPONDENT CAN NOT EXPLAIN NOW MR. GRAHAM'S MITIGATING EVIDENCE COULD HAVE BEEN FULLY CONSIDERED BY THE JURY THAT SENTENCED HIM TO DEATH

A. Respondent Misreads *Penry* and Distorts The Core Eighth Amendment Principles Upon Which *Penry* Was Based.

Penry's factual basis was simple; accordingly, this Court's analysis was straightforward. The three special issues presented to the jury did not provide a vehicle for considering fully Penry's evidence of mental retardation and abused childhood as it "b[ore] on his personal culpability," and no additional instructions were given to ensure that the sentencing decision reflected a "reasoned moral response" to Penry's mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 322-324 (1989). The Court concluded that this violated the constitutional mandate "that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 319. Faithful adherence to this Eighth Amendment tenet and a straightforward application of *Penry* compel the conclusion that Mr. Graham's jury was unconstitutionally precluded from expressing its reasoned moral response to his evidence of youth, troubled family background, and the redeeming aspects of his character.

Despite endorsing this bedrock Eighth Amendment principle as articulated in *Penry*, Respondent argues that *Penry* applies only when a defendant offers evidence of a mental condition which is both permanent and without any mitigating relevance to the special issue regarding future dangerousness. R.B. at 13. This distortion of *Penry* can be explained only as an attempt to uphold Mr. Graham's death sentence.

Mr. Graham has fully described the preclusive effect of the Texas sentencing statute, as applied to his mitigating evidence. Petitioner's Brief (hereinafter P.B.) at 21-39. Even in the face of this extensive demonstration, Respondent repeatedly complains that "Graham neither identified the relevance of his mitigating evidence outside the scope of the special issues nor suggested what instructions might be given to cure the defect he believes to exist." R.B. at 13. See also R.B. at 28, 29. Respondent hopes, no doubt, that repetition will improve the sound of its argument. To still the echo of this refrain, Mr. Graham will revisit the unconstitutional inadequacy of the former Texas special issues as applied to the unique and compelling evidence of his background and character.

B. As In *Penry*, Mr. Graham's Mitigating Evidence Was Relevant To An Assessment Of His Personal Moral Culpability Beyond The Scope Of The Texas Special Issues.

Gary Graham was 17 years old at the time of the offense and possessed all the qualities of his young age. He was nearing the end of adolescence but was clearly not yet an adult. Because of his youth, Mr. Graham possessed the very qualities that people consider instinctively when they think of teenagers: he was immature, impetuous, impulsive, and lacked judgment. As a teenager, he had none of the experience that comes with age and maturity – experience which enables people to appreciate the consequences of their actions and to consider the options and opportunities of the future.

In addition to those qualities common to youth, Gary Graham suffered extraordinary infirmities. Gary Graham never had the benefits of a stable home or the consistent nurturing and guidance of loving parents which are so critical to a child's development. He was virtually abandoned as a child by his mother who was hospitalized between twenty and thirty times for treatment of her

relentless mental illness. As a consequence, he was shuffled from one relative's home to another. Not only was young Gary deprived of the guidance and nurture of his mother, he was haunted by the disturbing image of her in trouble and suffering from the pain of her mental illness.

Despite his difficult childhood history, Gary Graham also possessed redeeming qualities. He helped his parents and grandparents with household chores, and worked with his father. Although himself little more than a child, he had children of his own, and the money he made from work was spent on them. He not only received his grandparents' love, he had earned it and repaid it in kind. He was a religious young man who regularly attended church with his grandmother. These positive qualities also readily could be understood by all jurors without elaboration. They demonstrated to the jury that although Gary Graham over a nine day period had lashed out in very violent ways, he possessed positive qualities and was struggling to meet his responsibilities to those who loved, cared for and depended on him. They demonstrated that this troubled young man nevertheless had redeeming value as a human being.

The composite of all his mitigating evidence, not parsed out into neat yet inadequate categories, showed the jury an adolescent moving toward adulthood, burdened by his past and his youth, yet possessing innocence and faith. This evidence was certainly powerful enough to convince his jurors that Mr. Graham was less morally culpable for his criminal acts than other defendants. *Penry*, 492 U.S. at 322.[2]

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[2] The jury could infer from his composite evidence of youth and troubled childhood that Gary did not have the tools of an adult or of most seventeen year olds to cope with his world or to assume adult responsibilities. As this Court observed in *Eddings v. Oklahoma*:

> [Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing*.

455 U.S. 104, 115-116 (1982) (citation omitted) (emphasis added). The Court in *Eddings* also observed that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent the failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* at 115 n.11.

The ability of Mr. Graham's jury to fully consider and give effect to evidence of his youth, impoverished childhood, and redeeming qualities was critical to a proper assessment of his personal moral culpability. However, Mr. Graham's jury was precluded from doing so. The jurors who heard this information were not instructed to consider Mr. Graham's personal moral culpability for the crime and were not allowed to express a reasoned moral response to his evidence. Instead, they were limited to the inquiries posed by the same three special issues addressed by this Court in *Penry*.

Respondent's version of *Penry* ignores the constitutional principles underlying that decision, and distorts this Court's language and rationale. *Penry* recognized two constitutional problems with the former Texas special issue structure. First, the special issues, in some circumstances, turned what should properly be considered as mitigating evidence into an aggravating circumstance. The "two-edged" quality of the former special issue structure thus precluded not the consideration of evidence, but the consideration of the mitigating value of that evidence. *See Penry*, 492 U.S. at 324.

Second, and equally important, was the manner in which the special issue questions operated unconstitutionally to preclude the full mitigating value of evidence presented. This Court acknowledged that the special issues might allow for the consideration of some mitigating aspects of a defendant's evidence. However, the narrow scope of the former special issue inquiry precluded jurors from considering mitigating evidence as it bore directly on an individual's reduced moral culpability. *Id.* at 323.

This analysis applies to each of the former special issues. Just as "[p]ersonal culpability is not solely a function of the defendant's capacity to act 'deliberately,' " *id.* at 322, so too is it not solely a function of a defendant's undefined propensity for future criminal acts, nor of the victim's actions. See P.B. at 38. Respondent ignores completely this important aspect of *Penry* in an attempt to deny the constitutional error manifest in this case.

In Mr. Graham's case, the jury was precluded by the operation of the former Texas special issues in both constitutionally impermissible ways. The first special issue limited the jury to an inquiry concerning the deliberateness of Mr. Graham's actions. As with Penry's mental retardation and child abuse, Mr. Graham's evidence of youth, troubled childhood and redeeming qualities was relevant to his personal culpability beyond the jury's inquiry into deliberateness. As in *Penry*, although Mr. Graham's evidence of youth and troubled childhood may have had some bearing on his ability to act deliberately, it also had relevance to his moral culpability – his deathworthiness – beyond the scope of that inquiry. *Id.* at 322.

Likewise, as in *Penry*, the former second special issue prevented Mr. Graham's jury from expressing its reasoned moral response to his mitigating evidence as it related to his personal culpability. An inquiry regarding future dangerousness is distinct from an inquiry into

personal moral culpability. As with deliberateness, an assessment of personal moral culpability does not necessarily correlate with a prediction of future behavior. Personal moral culpability, or blameworthiness, encompasses more than a determination of criminal guilt or the unquantified determination of future dangerousness. *Id.* at 324. A proper assessment of Gary Graham's personal moral culpability required his jury to consider all aspects of his background and character and the circumstances of the offense to determine whether, in light of his youth and troubled background and his redeeming qualities, he was deserving of death or life. Although Mr. Graham's jury could have concluded that his evidence of youth, troubled background, and redeeming character traits may have been relevant to the inquiry of future dangerousness, it still might well have concluded that this same evidence, as it related to his complete personal moral culpability, suggested a sentence of life.

Also, as described in Petitioner's opening brief, Mr. Graham's evidence of youth and his troubled childhood were potentially double-edged with respect to the second special issue in the same way as Penry's evidence of mental retardation. P.B. at 30. In *Penry* this Court concluded that because "one effect of [Penry's] retardation [was] his inability to learn from his mistakes," evidence of mental retardation could be an aggravating factor under the jury's inquiry into future dangerousness. 492 U.S. at 323. In the same manner, the jury could have concluded that Mr. Graham's mitigating evidence increased rather than decreased the possibility that he would pose a future danger. First, as argued by the prosecutor, because Mr. Graham engaged in violent behavior at 17 years, he was more likely than other, older people to continue behaving violently. Second, the jury could have concluded that Mr. Graham's violent experiences at such a young age, given his unstable and troubled childhood, made it less likely that, as he aged, he would develop the judgment and self-control of a normal

adult. *See id.* at 323. Third, because of Mr. Graham's youth, his jury was forced to consider a longer period in the "future" in which he might again be violent, than if he were an older defendant. See P.B. at 30-31.

The central leap of faith in Respondent's argument is that, *as a matter of law,* every juror will conclude that the qualities of youth necessarily dissipate and, therefore, that a teenage defendant's personal culpability is perfectly co-extensive with his likely future dangerousness. R.B. at 31-32. This Court's analysis in *Penry* flatly contradicts Respondent's argument by stressing the importance of "full consideration" of evidence that mitigates against the death penalty, as a prerequisite to a constitutional capital sentencing decision:

> Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a " 'reasoned *moral* response to the defendant's background, character and crime.' " *Franklin,* 487 U.S., at ___, 101 L.Ed.2d 155, 108 S.Ct. 2320 (opinion concurring in judgment) (quoting *California v. Brown,* 479 U.S. at 545, 93 L.Ed.2d 934, 107 S.Ct. 837 (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson,* 428 U.S., at 305, 49 L.Ed.2d 944, 96 S.Ct. 2978, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Penry, 492 U.S. at 328 (emphasis in original). The jury's consideration of the temporary quality of youth does not begin to exhaust youth's mitigating value. *See Eddings,* 455 U.S. at 115-116. As with the inquiry concerning deliberateness, the mere possibility that a jury would give mitigating effect to one aspect of youth, *i.e.,* its transient

nature, under the second special issue cannot satisfy the Eighth Amendment.[3]

With respect to the former third special issue, Mr. Graham's evidence of youth, troubled childhood, religious devotion and positive character qualities was outside the scope of the issue for the same reasons identified in *Penry.* Mr. Graham was convicted of shooting and killing a man during a robbery. There was no evidence of any provocation by the deceased. Thus, a juror who believed that Mr. Graham "lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded the [Mr. Graham's] action was not a reasonable response to provocation." *Penry,* 492 U.S. at 328. Mr. Graham's evidence, again like Penry's, was not relevant to the third special issue.

Respondent's application of *Penry* to Mr. Graham's evidence ignores the well settled Eighth Amendment principle which dictated the result in *Penry* in favor of a rule that would allow states to relegate all mitigating evidence to the function of negating an aggravating circumstance. See R.B. at 28.[4] This argument, in effect,

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[3] Respondent implicitly acknowledges that the jury's inquiry into future dangerousness under the second special issue is independent from its consideration of person moral culpability. Respondent points to the jury's determination of guilt and its inquiry into "deliberateness" as the statutory mechanisms which satisfy the Eight Amendment's requirement that the jury consider the defendant's personal culpability. R.B. at 33.

[4] When its argument runs into difficulty because of the trial court's comments to the jurors at *voir dire,* Respondent states: "the statutory terms at issue relate to matters that might support affirmative answers to the special issues, *i.e.* 'aggravating' factors *that have no logical connection to the inquiry as to whether a rational jury could give effect to Graham's 'mitigating' evidence.*" R.B. at 28. This statement in effect concedes Mr. Graham's point: Any rational juror presented with the former Texas sentencing

would eliminate individualized consideration of a defendant's circumstances, and would leave unregulated aggravating circumstances as the only vehicle for capital jurors to express their moral response. Not only would this outcome overturn sixteen years of this Court's Eighth Amendment jurisprudence, it would create manifestly unfair and arbitrary sentencing structures and prevent rationality and reviewability in sentencing. *See Penry*, 492 U.S. at 326-328. This Court need not and should not accept Respondent's invitation.

II.

RESPONDENT'S JUSTIFICATIONS FOR THE PRECLUSION OF MR. GRAHAM'S MITIGATING EVIDENCE ARE INSUPPORTABLE AND CONTRARY TO THE CORE EIGHTH AMENDMENT REQUIREMENT OF INDIVIDUALIZED SENTENCING IN CAPITAL CASES

Respondent, failing to reconcile *Penry* with the denial of relief here, attempts to justify the limitations placed on juror consideration of mitigating evidence in Mr. Graham's case. To that end, Respondent manipulates this Court's holdings until they are unrecognizable, attempting to interpose a "nexus" requirement on mitigating evidence that has no support under the Eighth Amendment. When this line of reasoning fails, Respondent sinks to denigrating the Texas legislature's appropriate response to the constitutional flaw identified in *Penry*.

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scheme must likewise conclude that the special issues, and their specific terms, only "relate to matters that might support affirmative answers to the special issues, *i.e.* 'aggravating factors' " because they function only to focus the jury's attention upon the aggravating "edge" of the evidence presented. Further, if Respondent perceives no logical link between the very terms of the special issues and mitigating evidence, it cannot possibly argue that a jury of laypersons "could give effect to Graham's 'mitigating' evidence." *Id.*

Renouncing the very constitutional principles it professes to support, Respondent stands alone in its defense of the now abandoned scheme that led ineluctably to Mr. Graham's sentence of death.

A. The Cases Relied By Respondent Do Not Support The Restrictions On Jurors' Consideration Of Mitigating Evidence That It Seeks To Impose Against Mr. Graham.

Just as the power of Mr. Graham's argument is illuminated by the operation of the former Texas scheme in light of *Penry*, so too is his contention supported by this Court's analysis of the sentencing factors in other states' death penalty statutes. Respondents relies upon *Saffle v. Parks*, 494 U.S. 484 (1990), *Boyde v. California*, 494 U.S. 370 (1990), and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), to support its effort to preclude Mr. Graham's mitigating evidence and to characterize Mr. Graham's claim as contrary to *Jurek v. Texas*, 428 U.S. 262 (1976). These cases, honestly read in light of the state statutes they addressed and the application of those statutes to proffered mitigating evidence, do not support Respondent's restrictive view of the Constitution but, rather, support relief for Mr. Graham.

The central theme of each case was that a capital sentencing scheme only satisfies the Eighth Amendment if it does not preclude a sentencer from fully considering mitigating evidence, and provides that sentencer with an adequate vehicle for expressing its reasoned moral response to all the evidence – aggravating and mitigating – presented. *Parks*, *Boyde* and *Blystone* each involved a capital sentencing scheme in which the jurors were specifically instructed to consider all mitigating evidence presented and were empowered to express their reasoned moral response to that evidence in the form of a life sentence. In fact, it was these qualities of the sentencing statutes which led this Court to uphold them against Eighth Amendment attack.

To argue that states may preclude full consideration of the mitigating value of evidence, Respondent relies on surgically extracted language from these cases while ignoring the constitutional principles that were at issue before this Court. Both the California statute at issue in *Boyde* and the Pennsylvania statute analyzed in *Blystone* empowered the jury to fully and independently consider all aspects of mitigating evidence presented. Both statutes also afforded sentencers a specific vehicle for giving effect to their reasoned moral response to evidence in the form of a life sentence. In each instance, this Court held that these statutory requirements satisfied *Penry*, 492 U.S. 302, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978).

Respondent also clings to *Parks* to justify the preclusion of Mr. Graham's evidence. However, as in *Blystone* and *Boyde*, this Court held that the Eighth Amendment was satisfied in *Parks* because the jury was specifically instructed to consider all mitigating evidence and statutorily allowed to give effect to that evidence. 494 U.S. at 491. The additional instruction of the trial court not to consider sympathy for the defendant did not operate, contrary to Parks' assertion, to limit or exclude the consideration of mitigating evidence. *Id.* at 492. Although, as this Court observed, it is true that "[s]tates are free to structure and shape consideration of mitigating evidence to achieve a more rational and equitable administration of the death penalty," *id.* at 377, states are *not* free to deny a vehicle for the full consideration of mitigating evidence. *Id. See also Penry*, 492 U.S. at 327, *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987).

Respondent also attempts to use *Parks*, *Boyde*, and *Blystone* to portray Mr. Graham's claim under *Penry* as conflicting with *Jurek*. R.B. at 29. However, in *Parks*, *Boyde*, and *Blystone* this Court relied on the same governing principle employed in *Jurek*, *Lockett*, *Eddings*, and *Penry*: the Eighth Amendment mandates that states may not restrict sentencers' consideration of mitigating evidence, nor may states prevent jurors from giving effect to their reasoned moral response to that evidence.

Contrary to Respondent's diversionary argument, *Penry* and *Jurek* are fully complementary:

> *Penry* . . . must be understood in terms of the Court's ruling in *Jurek*, and its application in later cases. We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek;* rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek* . . . , and confirmed the necessity of its application to Penry's claim.

Parks, 494 U.S. at 492 (citations omitted).[5]

In stark contrast to the statutory schemes addressed in *Parks*, *Boyde*, and *Blystone*, Mr. Graham's jury, as in *Penry*, was instructed only in the bare terms of the former Texas sentencing statute. As in *Penry*, those narrow and preclusive instructions prevented full consideration of his youth, troubled family background, religious devotion and filial duty and denied the jurors any vehicle for giving effect to this relevant evidence that might well have convinced them to decline to impose a sentence of death. *Penry*, 492 U.S. at 328.

B. Respondent's Attempt To Preclude Mr. Graham's Mitigating Evidence by Interposing A "Nexus" Test Finds No Support In This Court's Eighth Amendment Jurisprudence.

Respondent, as demonstrated above, fails to meaningfully distinguish Mr. Graham's claim from *Penry*, and claims

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[5] The Court also recognized:

> *Penry* interpreted *Jurek* as holding the death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant.

Parks, 494 U.S. at 492. *See also*, *Boyde*, 494 U.S. at 377, *Blystone*, 494 U.S. at 304-305.

This Court's discussions in *Parks*, *Boyde*, and *Blystone* also dispose of Respondent's contention that Mr. Graham asks that *Jurek* be overruled. See R.B. at 13, 29. He asks only what was granted in *Penry*; that the promise of *Jurek* be redeemed, and that the Court reaffirm the authority – from *Woodson* to *Lockett* and *Eddings* – on which *Penry* rests.

to find support for the preclusion of mitigating evidence in this Court's cases. Thus frustrated, Respondent asks this Court to require proof of a "nexus" between mitigating evidence and the crime. Reiterating the argument made and rejected in *Penry*, Respondent without citation to authority states:

> [E]vidence of a defendant's character or background has mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character proffered in mitigation of punishment.

R.B. at 18. Respondent further claims that "unless the defendant can demonstrate some connection between the crime and his proffered evidence, he does not show that he is less culpable than any other person." *Id.* at 19.[6]

Respondent's "nexus" argument is controverted by an unbroken line of this Court's authority. The uncontested constitutional object of bifurcated sentencing proceedings in capital cases is the assurance of an individualized sentencing determination. *See Jurek v. Texas*, 428 U.S. 262, 271-272 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 (1976). To insure

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[6] Even if a "nexus" requirement existed in this Court's constitutional jurisprudence, the evidence presented by Mr. Graham is clearly relevant to his moral culpability. Mr. Graham's evidence of youth and youthful attributes, of an absent father and a disturbed and absent mother, of successive caretakers during his childhood, and the pressures of supporting children of his own at such a young age could all lead a juror to conclude that he was less morally culpable than defendants who have no such excuse. *See Penry*, 492 U.S. at 322. Further, his remaining mitigating evidence of positive character traits, good deeds, and religious devotion can not be separated from the evidence above as they demonstrated, when considered *in toto*, that Mr. Graham possessed intrinsic worth which made him deserving of a sentence less than death.

that goal, this Court long ago determined that the Constitution "requires consideration of the character and record of the individual offender and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304.[7] This Court has followed this mandate without exception. *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987); *Sumner v. Shuman*, 483

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[7] Over fifty years ago, this Court recognized:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937). *See also, Williams v. New York*, 337 U.S. 241, 247-249 (1949)).

Citing *Williams*, Respondent only credits as valid sentencing concerns "society's interest in retribution, deterrence, and rehabilitation." R.B. at 18. As with much of its Brief, Respondent's selective quotation obscures the fact that the Court in *Williams* actually supported the other relevant sentencing concern – individualized sentencing:

> Highly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

Williams, 377 U.S. at 247 (footnote omitted). The Court went on to state:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. The whole country has travelled far from the period in which the death sentence was an automatic and commonplace result of convictions. . . .

Id. The sentencing concern of individualized consideration – applauded in *Ashe* and *Williams* and omitted by Respondent – was held to be a constitutional requirement of capital sentencing in *Woodson*.

U.S. 66, 75-76 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597 (1991), is the most recent demonstration that Respondent's "nexus" argument is out of line with this Court's Eighth Amendment cases. *Payne* upheld the State's presentation of "victim impact" testimony, concerning the "specific harm" suffered by the victim of the crime and her survivors, in large part on the premise that "virtually no limits are placed on the relevant mitigating evidence a defendant may introduce concerning his own circumstances." *Id.* at 2607. This Court emphasized that such mitigating evidence "*must* be received" and considered, even if none of the mitigating evidence is related to the circumstances of the crime. *Id.* (emphasis in original); *see also id.* at 2608-2609 (noting that evidence that defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite that "[n]one of this testimony was related to the circumstances of [the] crimes").[8]

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[8] Respondent misstates Justice O'Connor's views on mitigating evidence. Citing *California v. Brown*, 479 U.S. 538 (1987), Respondent alleges that Justice O'Connor regards a defendant's background and character as constitutionally relevant only if "the capital murder is to some degree attributable to those aspects of character proffered in mitigation of punishment." R.B. at 18. One might usefully compare this representation with, for example, Justice O'Connor's opinion in *Gathers*:

> *Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so.* . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . *None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.*

490 U.S. at 827-838 (O'Connor, J., dissenting on other grounds) (emphasis added).

Even the cases Respondent relies on flatly dispute this novel "nexus" argument. Curiously, Respondent relies on *Boyde v. California*, 494 U.S. 370 (1990), for its claim that mitigating evidence must relate to the specific criminal act. R.B. at 19, 20. In fact, *Boyde* holds exactly the opposite. As discussed above, *Boyde* upheld the California jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence. In particular, this Court noted that the instructions allowed for consideration of evidence that was *not* linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] *allow for consideration of mitigating evidence not associated with the crime itself*, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, *and youth*.

Boyde, 494 U.S. at 383 (emphasis added).

Therefore, the constitutionality of the sentencing scheme in *Boyde* was upheld precisely because the Court found that the statute adequately allowed the jury to consider evidence relevant to *moral* culpability and the appropriate desserts beyond the narrow issues of *criminal* culpability and guilt. The import of *Boyde*, supported by the sum of Eighth Amendment death penalty jurisprudence, is that any sentencing scheme which *does* limit the consideration of mitigating evidence solely to criminal culpability for the specific act for which the defendant was found guilty cannot withstand constitutional challenge.

Like its attempt to enlist this Court's cases in its campaign to preclude juror consideration of Mr. Graham's evidence, Respondent's interposition of a "nexus" requirement between mitigating evidence and a capital sentencer cannot bear constitutional scrutiny.

C. Respondent Fails To Acknowledge The Significance Of Texas' Actions to Correct The Manifest Problem Identified In *Penry*.

The actions of the Texas legislature in light of *Penry* belie Respondent's argument for preclusion of mitigating evidence. Respondent denigrates the legislature's legitimate attempts to cure the constitutional defect in the former Texas sentencing scheme and to attain the fairness required by the Eighth Amendment. Respondent's argument not only illustrates how it stands alone in its insistence on limiting mitigating evidence, its position is also disingenuous.[9]

The application of amended Texas Code of Criminal Procedure, art. 37.071 would cure the defect in Mr. Graham's trial while assuring reliability and reviewability of jury sentences in capital cases. P.B. 19-20. The vehicle by which the Texas legislature has chosen to empower jurors in a capital case has much in common with the statutes upheld by this Court – and relied on by Respondent – in *Parks*, *Boyde* and *Blystone*.[10]

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[9] When suiting its purpose, Respondent praises the work of the Texas lawmakers: "The efforts of the Texas Legislature to achieve rationality and evenhandedness in capital sentencing are represented in [*former*] Article 37.071 of the Texas Code of Criminal Procedure, the [facial] constitutionality of which was confirmed in *Jurek v. Texas*, 428 U.S. 262 (1976)." R.B. at 16 (emphasis added). Respondent has no such praise for the legislature's 1991 amendment of the statute.

[10] Contrary to Respondent's assertion, Mr. Graham does not argue that the Constitution commands states to adopt "weighing" statutes. See R.B. at 17. Mr. Graham notes that (1) all the cases on which Respondent relies are ones holding that particular weighing statutes pass constitutional muster, (2) the former Texas statute scheme was found wanting in *Penry*, and (3) in light of this constitutional history, Texas has now chosen a weighing mechanism in its new sentencing statute.

Respondent's belittling of Texas' legislative response to *Penry* rings hollow. Respondent now describes "[t]he amendment [of art. 37.071] upon which Graham relies" as "a legislative overreaction to the concerns the Court voiced in *Penry*." R.B. at 27. This criticism is at best curious, inasmuch as counsel for Respondent was instrumental in drafting the post-*Penry* statute and urged its adoption before the Texas legislature.[11] The Texas legislature not only "believed an amendment was appropriate," R.B. at 27, but, less than a year ago, the executive branch of Texas – that is, Respondent – believed that this particular amendment was appropriate and necessary to deal with mitigating evidence like that presented by Mr. Graham at his trial.

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[11] In fact, Assistant Attorney General Robert Walt – who represented Respondent in all previous federal proceedings in this case, including, until recently, those in this Court – was a chief architect of this legislation. See Testimony of Mr. Robert Walt, Assistant Attorney General for the State of Texas before the Senate Criminal Justice Committee, April 14, 1991, supporting Senate Bill 880 (Amendment to Tex. Code Crim. Proc., art. 37.071 as adopted) (describing his involvement in the drafting of the bill to meet the requirements of *Penry*). See also Testimony of Mr. Rob Kepple, General Counsel for the District Attorney's Association, before the Senate Criminal Justice Committee, April 14, 1991, supporting Senate Bill 880 (Amendment to Tex. Code Crim. Proc., art. 37.071 as adopted) ("Bob Walt and his crew [the people in the Attorney General's Office who handle capital appeals on behalf of the State of Texas] have been working very carefully to make sure that we have something that follows what the Supreme Court tells us we need to do."

CONCLUSION

For all the reasons set out in Mr. Graham's opening brief, and in this Reply, he renews his request that the Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit in his case and remand with directions to grant the writ of *habeas corpus*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 8 1992
OFFICE OF THE CLERK

No. 91-7580

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION,
Respondent

BRIEF OF PATRICK F. ROGERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Are the mitigating circumstances for which the Eighth Amendment requires Texas to provide an additional vehicle, beyond the former Texas Special Issues, for a sentencing jury to express its "reasoned moral response" narrowly limited, as a matter of law, to "uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own?" Graham v. Collins, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc).

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INTEREST OF AMICUS CURIAE

This brief amicus curiae is submitted pursuant to Rule 37.2 of the Rules of this Court and is filed in support of Petitioner.[1]

The amicus, Patrick F. Rogers, stands convicted of capital murder and sentenced to death by the State of Texas. Rogers was tried and sentenced prior to this Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989), under the same Texas capital sentencing procedures at issue in Penry and this case. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981).

At trial, Rogers, who was 21 years old at the time of his crime, presented evidence that his life changed for the worse during the year before his crime due to his use of drugs, principally PCP and marijuana. There was overwhelming evidence that Rogers was intoxicated from ingestion of PCP at the time of his crime. In Rogers' state court application for habeas corpus relief, he asserted that the evidence of his drug use and intoxication at the time of the crime was mitigating evidence beyond the scope of the Texas Special Issues and that it was "two-edged sword" evidence such as that described by this Court in Penry. 492 U.S. at 323-24.

With three judges dissenting, the Texas Court of Criminal Appeals denied post-conviction relief on Rogers' claim based on Penry. Ex parte Rogers, 819 S.W.2d 533 (Tex. Crim. App. 1991). The dissenting judges would have granted relief because Rogers' evidence of drug addiction and intoxication had mitigating value

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[1]The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 37.2 of the Rules of this Court.

beyond the scope of the Texas Special Issues. 819 S.W.2d at 534-37 (Clinton, J., dissenting). Rogers has filed a petition under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Texas.

REASONS FOR GRANTING THE WRIT

This Court has held that " . . . in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987) (emphasis added). In Penry, this Court held that whether the Texas sentencing procedure is constitutionally applied depends, in each case, on whether the Special Issues allow the jury to consider, and give effect to, all pertinent mitigating evidence about the particular offender and particular offense. 492 U.S. at 319-28.

In the case below, the Fifth Circuit departed from this Court's decisions and adopted, as a matter of law, an exceedingly underinclusive test for determining whether the Eighth Amendment requires Texas to supply another vehicle, beyond the former Special Issues, for a sentencing jury to express its "reasoned moral response" to the particular defendant and the circumstances of the crime. According to the Fifth Circuit, the Eighth Amendment requires an additional instruction or jury question on mitigation only when "some major mitigating thrust" of the evidence is "substantially beyond" the scope of all of the former Special Issues. Graham v. Collins, 950 F.2d at 1026-27 (Slip op. at 2019).

The Fifth Circuit then announced a uniquely restrictive specification for the only type of mitigating evidence that can

meet its test. The Fifth Circuit held that another instruction or question is required only when there is substantial evidence of " . . . uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." 950 F.2d at 1029 (Slip op. at 2022).

By loading limiting modifiers into its definition of the mitigating evidence for which the Eighth Amendment requires relief--"uniquely severe," "permanent," and "no fault of his own"-- the Fifth Circuit swept aside this Court's decision in Penry as a precedent with which the lower courts must deal in Texas death penalty cases. In effect, the Fifth Circuit negated Penry by restricting it to the specific facts of Penry's case.

The Fifth Circuit's opinion in Graham cuts deeply into this Court's Eighth Amendment jurisprudence. By limiting so

narrowly the mitigating evidence to which Penry applies, the Fifth Circuit placed numerous mitigating circumstances beyond Eighth Amendment analysis. For example, the Fifth Circuit has already applied Graham to foreclose consideration of whether evidence of voluntary intoxication at the time of the crime has mitigating force beyond the scope of the Texas Special Issues. Cordova v. Collins, 953 F.2d 167, 169-70 (5th Cir. 1992).

Further, because the Fifth Circuit limits Penry to "uniquely severe permanent handicaps," no evidence of curable mental or emotional disabilities, no matter how severe, can necessitate an additional question or instruction on mitigation. This conflicts with the manner in which other courts have interpreted Penry. See Gribble v. State, 808 S.W.2d 65, 75-76 (Tex. Crim. App. 1990), cert. denied, 111

S.Ct. 2856 (1991) (requiring an additional mitigation instruction to allow the jury to consider and give effect to evidence of "severe mental illness, depression, and psychotic delusions"); Smith v. McCormick, 914 F.2d 1153, 1166-69 (9th Cir. 1990) (requiring an instruction to allow a Montana jury to consider whether defendant's ingestion of large quantities of LSD and alcohol on the day of the offense should mitigate a sentence of death); cf. Toole v. State, 479 So.2d 731, 733-34 (Fla. 1985) (pre-Penry decision requiring an instruction to allow a Florida jury to consider evidence that defendant suffered from pyromania).

This Court should not allow its decision in Penry to be trivialized, as the Fifth Circuit has done. This Court found Penry's mental retardation to be outside the scope of Special Issue No. 1, which

inquires whether the defendant acted "deliberately," because "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" Penry, 492 U.S. at 322. Justice O'Connor explained, for the Court:

> A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or evaluate the consequences of his conduct, . . . that same juror could also conclude that Penry was less morally "culpable than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

492 U.S. at 322-23.

This Court also found Penry's mental retardation relevant to Special Issue No. 2, because the evidence suggested an affirmative answer to the question "whether there is a probability that the defendant

would commit criminal acts of violence that would constitute a continuing threat to society." The Court observed that without an additional instruction or question allowing the jury to consider the mitigating effect of Penry's retardation, such evidence became, within the context of the Texas Special Issues, a "two-edged sword." The evidence "may diminish [a defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." Penry, 492 U.S. at 324.

The holding of Penry clearly reaches beyond the narrow limits to which the Fifth Circuit has confined it. The Fifth Circuit's severe limitation of the types of evidence to which Penry applies pretermits individualized consideration by the lower federal courts of meritorious Eighth

Amendment claims, including claims such as that presented by amicus Rogers.

The principal defensive theory during the sentencing phase of Rogers' trial was that Rogers was in a drug-induced stupor at the time of his crime.[2] A psychiatrist testified that Rogers used PCP, in combination with marijuana, during the hours before the crime. The doctor testified that PCP, even in single doses, can cause individuals to "behave or carry on their activities in an illogical manner and in a manner in which they are detached from reality and the person will act as if they are unaware of the consequences of what they do." The doctor opined that the shooting for which Rogers was convicted was

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[2]This Court has held that in capital cases, sentencing juries must be allowed to consider, as a mitigating circumstance, the influence of drugs and alcohol. Roberts v. Louisiana, 431 U.S. 633, 637 (1977).

one act in a series of "bizarre, detached behavioral events in which Rogers wouldn't be aware of the consequences . . . and wouldn't be able to assess quality to it, either good or bad or any moral quality to it."

Eyewitnesses testified that Rogers acted strangely on the morning of the shooting by "hopping up on top of his tip-toes, just sort of in a jump, like a dance." Other witnesses to the shooting said that Rogers "just started shooting, jumping up and down," and that he "shot with his right hand and then . . . took both hands and just sort of danced around."

Following this Court's opinion in Penry, a reasonable juror could have found that although Rogers acted "deliberately," he acted while his judgment and inhibitions were suspended by PCP, and thus did not deserve a death sentence. Rogers' jurors

were given no vehicle by which to express that second thought. See Ex parte Rogers, 819 S.W.2d at 536-37 (Clinton, J., dissenting).

As in Penry, Rogers' mitigating evidence of drug use and drug intoxication was also "two-edged." The jury likely thought that the evidence that Rogers used PCP and committed violent acts while using PCP pointed forcefully to "yes" as the answer to the question whether Rogers would commit future acts of violence. In fact, the prosecutor emphasized that point in closing argument to the jury by arguing that Rogers' drug use "is another series of criminal acts this man has continued to commit against society" and that the jury should not use the evidence as a mitigation in Rogers' favor. He also stated that "you can predict from all of this that he's

going to commit further acts of violence. It's obvious. It's clear."

Further, in the sentencing phase, Rogers' prosecutor also focused the jurors on the literal questions posed by the Special Issues and warned them against giving the evidence <u>independent</u> mitigating effect. The prosecutor argued:

> You took an oath that the fact that death or life imprisonment might be imposed would not effect any deliberations of yours. <u>In other words, you cannot let the effects of your answers dictate how you answer the questions.</u>

(Emphasis added). <u>Compare Penry</u>, 492 U.S. at 325-26.

The former Texas Special Issues were not sufficiently broad to permit Texas juries, in every case, to consider and give effect to all relevant mitigating evidence that a defendant might present, as required by the Eighth Amendment. In <u>Penry</u>, this Court held that when the Special Issues,

reasonably read, do not allow the jury fully to consider and give effect to all of the mitigating evidence, and especially when the mitigating evidence is "double-edged," the Eighth Amendment requires something more.

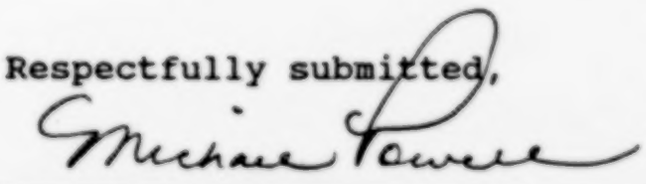
<u>Amicus</u> Rogers' case presents one example of mitigating circumstances that are within this Court's decision in <u>Penry</u>, but outside the Fifth Circuit's narrow holding in <u>Graham</u>. Rogers' case illustrates the extreme underinclusiveness of the decision below.

CONCLUSION

This case is of substantial importance to the nation's death penalty jurisprudence. It was decided below by the <u>en banc</u> Fifth Circuit, and the issues are focused by the sharply-divided majority and dissenting opinions. For the reasons stated in those dissenting opinions, this

brief, and the Petition for Writ of Certiorari, amicus curiae Patrick F. Rogers requests the Court to grant a writ of certiorari and reverse the decision of the Fifth Circuit.

Respectfully submitted,



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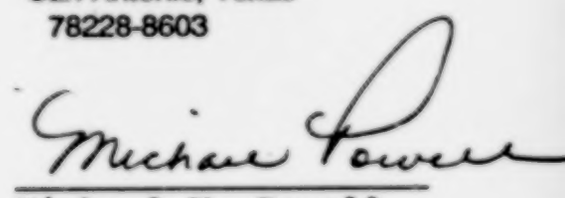

Michael V. Powell

FILED
JUL 23 1992
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No. 91-7580

IN THE

Supreme Court of the United States

October Term, 1991

GARY GRAHAM,
Petitioner,
v.
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER GARY GRAHAM

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IN THE
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GARY GRAHAM,
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JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
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Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER GARY GRAHAM

INTEREST OF *AMICUS CURIAE*

Miguel A. Richardson, the petitioner in *Richardson* v. *Texas*, No. 91-6745, now pending before this Court, respectfully submits this brief *amicus curiae* in support of Gary Graham's

appeal. Both counsel for Petitioner and Respondent have consented to the filing of this brief.

Richardson, like petitioner Graham, urges this Court to clarify and reaffirm the constitutional principles embodied in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Penry* v. *Lynaugh*, 487 U.S. 1233 (1988), and to reject the similar misinterpretation and misapplication of *Penry* by the Fifth Circuit (in the instant case) and the Texas Court of Criminal Appeals (in Richardson's case). Both courts were sharply divided over similar (although not identical) issues of how to apply this Court's ruling in *Penry* to mitigating evidence quite different from the mental retardation and childhood abuse presented in *Penry*.

Like Gary Graham, Miguel A. Richardson was sentenced to death under the former Texas capital sentencing statute, which unconstitutionally precluded juries from considering and giving effect to mitigating evidence as required by the Eighth Amendment. *See Penry*, *supra*. The Texas Court of Criminal Appeals affirmed Richardson's death sentence on October 28, 1987, 744 S.W.2d 65, and he timely petitioned this Court for a writ of certiorari. This Court held that petition for the entire October 1988 term, while it considered *Penry*. Following its decision in *Penry*, this Court *granted certiorari*, remanding to the Texas Court of Criminal Appeals for further consideration in light of *Penry*. *Richardson* v. *Texas*, 492 U.S. 914 (1989). That court nevertheless reaffirmed Richardson's death sentence, in a 4-3 decision. Richardson again petitioned this Court for certiorari (No. 91-6745), and on June 8, 1992, this Court granted certiorari in the instant case, 60 U.S.L.W. 3827 (1992), and held Richardson's petition while it considers this case.

Richardson respectfully urges reversal of the Fifth Circuit's decision herein, in terms that will make clear to the Texas Court of Criminal Appeals that the majority opinion in his case misapplied *Penry* in much the same way as the Fifth Circuit majority did here. Indeed, the virtues of consistency and judicial economy suggest that, upon reversing the judgment herein, the Court should also grant Richardson's petition and summarily reverse and remand for a new trial, rather than ordering still

another round of reconsideration by the Texas Court of Criminal Appeals.

BACKGROUND

The mitigating evidence presented at Richardson's sentencing trial depicted a multi-faceted individual whom rational jurors might have found deserving of a life sentence, rather than death. Richardson presented five categories of mitigating evidence, some of which mirror the mitigating evidence before this Court in the instant case, which were either not relevant to the Texas special issues, or were relevant beyond the scope of those issues. Thus, like Graham, Richardson presented evidence of sincere religious devotion and strong family ties, including the testimony of four ministers and his Sunday school teacher, and evidence of voluntary service and kindness to others, including testimony about how he significantly helped a young girl with serious medical problems and suicidal tendencies. In addition, Richardson presented evidence of unusual artistic and poetic talent, and of a troubled youth leading to emotional and mental impairment, including the effects of racial tensions in the Oklahoma City schools and an abusive household that he was compelled to leave at an early age. Like Graham, Richardson did not receive a special instruction of the kind mandated by *Penry*, explaining how the jury could give effect to these mitigating factors in reaching its sentencing decisions. And like Graham in the Fifth Circuit, Richardson found his death sentence reaffirmed even after *Penry*, via a majority decision which erroneously restricted the rule of *Penry*, as we now show.

SUMMARY OF ARGUMENT

This Court, in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), articulated a simple and straightforward test for applying the constitutional requirement of individualized sentencing. That test had been dictated by this Court's earlier decisions in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982). This Court's clear bright-line *Penry* rule has been occluded by the Fifth Circuit in the instant case, *see* 950 F.2d

1009 (5th Cir. 1992) (*en banc*), and by the Texas Court of Criminal Appeals in *Richardson* v. *Texas*, 1991 WL 99949 (Tex. Crim. App. June 12, 1991) (en banc), both of which have added several additional unwieldy requirements to the simple *Penry* test. Both decisions erroneously introduced subjective standards of review, and injected an improper, time-consuming "re-weighing" of the facts and circumstances surrounding each case, inconsistent with the *Penry* holding and, in part, inconsistent with this Court's rationale in *Boyde* v. *California*, 484 U.S. 370 (1990). In contrast, the consistent application of *Penry* by the Oregon Supreme Court without these constrictive glosses has led to reversal of death sentences in circumstances indistinguishable from Graham's and Richardson's.

ARGUMENT

THE TEXAS COURT OF CRIMINAL APPEALS AND THE FIFTH CIRCUIT HAVE BOTH *OBSCURED THE SIMPLE PENRY TEST*

The rule of *Penry* is very simple. It requires a supplemental instruction under the former Texas sentencing statute *whenever* the defendant introduces evidence about "his background or character or the circumstances of the crime" that is *either* (1) "not relevant to the special verdict questions," *or* (2) "has relevance to the defendant's moral culpability *beyond the scope* of the special issues." Such an instruction is necessary to alert the jury that they may consider and give effect to such mitigating evidence and its ultimate impact on their "reasoned moral response" regarding the defendant's sentence. *Penry*, 492 U.S. at 321, 323. Absent such instruction, the Eighth Amendment mandates resentencing before a properly instructed jury.

Both the Texas Court of Criminal Appeals in *Richardson* and the Fifth Circuit in *Graham*, apparently believing that they must constrict *Penry* in order to avoid conflict with *Jurek* v. *Texas*, 428 U.S. 262 (1976), have created and superimposed several unwieldy requirements on this Court's simple *Penry* test. *Richardson*, 1991 WL 99949, at *3; *Graham*, 950 F.2d at 1017.

First, both courts have usurped the jurors' role of weighing the sufficiency of the mitigating evidence presented. The Fifth Circuit in *Graham* did so by requiring that, before a *Penry* instruction must be given, the evidence must have "*major* mitigating thrust" which extends "*substantially* beyond the scope of all the special issues." 950 F.2d at 1027 (emphasis added). Likewise, the Texas Court of Criminal Appeals, while conceding that evidence of artistic and poetic talent could require a *Penry* instruction under different circumstances, superimposed upon *Penry* a new requirement of "evidence demonstrating *lifelong dedication* to the arts or poetry in order to *gain status* as Eighth Amendment mitigating evidence." *Richardson*, 1991 WL 99949, at *3 (emphasis added). Likewise, it relied on its own weighing of the evidence of Richardson's voluntary service and kindness to others, holding that there was no need for a *Penry* instruction because it found that the evidence failed to show "lifelong qualities" of Richardson's. *Richardson*, 1991 WL 99949, at *2-3. Finally, it dismissed Richardson's evidence of religious commitment, finding that it failed to support "any *significant* religious devotion, of the *character* and *quality*, that would entitle appellant to a *Penry* instruction." *Id.* at *5 (emphasis added).

Under this Court's decisions from *Lockett* and *Eddings* right through *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988), and *Penry*, such conclusions about the *quality* and *weight* of the evidence are clearly within the exclusive province of a jury, not an appellate court. Nowhere in *Penry* did this Court establish a "threshold that mandates a *Penry* instruction." *Richardson*, 1991 WL 99949, at *5. On the contrary, this Court held that the trial judge's instructions must permit the jury "to consider and give effect to *any* mitigating evidence relevant to a defendant's background and character or the circumstances of the crime" and that "full consideration of evidence that mitigates against the death penalty is essential . . . ." *Penry*, 492 U.S. at 328 (emphasis added). This mandate recognizes that it is the "whole picture, the whole ball of wax," *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), rather than a single feature of the defendant's character or background, that often convinces reasonable jurors to spare a defendant's life.

Second, both the Fifth Circuit and the Texas Court of Criminal Appeals created a new threshold requirement, not required by *Penry*, that the mitigating condition be "permanent" in order to mandate a *Penry* instruction. As noted, in Richardson's case, the Texas court denied the need for a *Penry* instruction because it found that the evidence failed to show that Richardson's kindness and religious devotion were "lifelong qualities". *Richardson*, 1991 WL 99949, at *2-3, *5. Similarly, in the instant case, the Fifth Circuit declined to apply *Penry* to mitigating circumstances, such as youth, which were clearly subject to change with time. *Graham*, 950 F.2d at 1031; *id.* at 1034 (Reavley, J., dissenting) ("[the majority] holds that no instruction or jury decision is needed for transitory circumstances of mitigation"). Such a requirement of "permanence" finds no support in *Penry*, and constricts the jurors' opportunity to freely and fully evaluate mitigating evidence in reaching a "reasoned moral response."

Finally, and most importantly, both courts failed to recognize that evidence relevant to one or more of the special issues may have additional relevance beyond the scope of those questions. Both the Fifth Circuit and the Texas court overlooked what this Court made so clear in *Penry*—that the relevance of a particular mitigating circumstance to one or more of the special issues does not necessarily exhaust its relevance to a rational juror's conclusion about the appropriateness of a death sentence. If there is mitigating evidence which is relevant "beyond the scope of" the special issues, then a *Penry* instruction is still required. Thus, Graham's youth and troubled childhood had relevance to his ability to act deliberately (Special Issue Number One), because they made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry*, 492 U.S. at 322-23. But this evidence also had relevance beyond Special Issue Number One, because a juror could have believed that Graham acted deliberately, but still concluded, based on the evidence of youth and a troubled childhood, that Graham does not deserve to die.

By the same token, Richardson presented evidence of artistic and poetic talent, religious devotion, and acts of

kindness, some of which covered the period after his incarceration. But the Texas court found that evidence relevant *only* to Special Issue Number Two, refusing to acknowledge that it could affect a jury's "reasoned moral response" *beyond* its tendency to show lack of future dangerousness. *Richardson*, 1991 WL 99949, at *2-3, 5. Jurors could have found that Richardson had a propensity for future violence, while also finding, in the evidence of his capacity for kindness, faith, and creating works of art, a sufficient reason to spare his life. This Court has expressly recognized this point before. In *Boyde* v. *California*, 494 U.S. 370 (1990), this Court observed that mitigating evidence of "artistic ability" was *not* necessarily introduced to demonstrate that a defendant is a "model prisoner . . . and therefore unlikely to present a risk of future dangerousness," but rather "as part of petitioner's overall strategy to portray himself as *less culpable* than other defendants due to his disadvantaged background *and his character strengths in the face of those difficulties*." (*Id.* at 382-83 n.5; emphasis added.)[1/]

Moreover, Richardson's evidence of a troubled and abused childhood was precisely the kind of "two-edged sword" identified in *Penry*: "it may diminish [a defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Penry*, 492 U.S. at 324. Special Issue Number Two permitted this two-edged sword to cut only one way: Richardson's evidence could arguably have supported an affirmative answer to Special Issue Number Two, but the jury could not give effect to the intuitively mitigating quality of the same evidence.

The constricted application of *Penry* which has sharply divided both the Fifth Circuit and the Texas Court of Criminal Appeals has not infected the only other appellate court charged with interpreting and applying *Penry*—the Supreme Court of

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[1/] In *Boyde*, "factor (k)" of the California jury instructions—in contrast to the Texas special issues—*permitted* the jury to give "independent mitigating weight" to such "character strengths" wholly apart from a defendant's propensity for future violence.

Oregon. After deciding *Penry*, this Court remanded *Wagner* v. *Oregon*, 492 U.S. 914 (1989) to that court for further consideration. The record in *Wagner* contained mitigating evidence concerning the defendant's mental instability and suicide attempts, employment efforts, artistic ability, above-average intelligence, and relative youth—which at least one judge of the Oregon court found "sparse," but nevertheless should have been considered by the jury. *State* v. *Wagner*, 305 Or. 115, 752 P.2d 1136 (1988) (Gillette, J., dissenting).

Unlike the Texas court and the Fifth Circuit, the Oregon court, on remand, unhesitatingly found itself "compelled to vacate the judgment that affirmed the sentence of death" and to remand for resentencing—without any attempt to narrow or redefine the simple directive of *Penry*, or to usurp the jurors' function of weighing the sufficiency of the evidence, or to create any threshold test of "permanence." *State* v. *Wagner*, 305 Or. 5, 786 P.2d 93, *cert. denied*, 111 S. Ct. 212 (1990). And that court has continued its straightforward interpretation of *Penry* in subsequent capital cases. *See State* v. *Moen*, 309 Or. 45, 786 P.2d 111 (1990); *State* v. *Farrar*, 309 Or. 132, 786 P.2d 161, *cert. denied*, 111 S. Ct. 212 (1990); *State* v. *Miranda*, 309 Or. 121, 786 P.2d 155, *cert. denied*, 111 S. Ct. 212 (1990).

CONCLUSION

This Court should squarely address and remedy the misapplication of *Penry* by the Fifth Circuit and the Texas Court of Criminal Appeals. The instant case affords this Court an opportunity to reaffirm the simple *Penry* test, and thus reverse both Graham's and Richardson's sentences.[2/]

Dated: July 23, 1992

Respectfully submitted,

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[2/] Nevertheless, should this Court affirm in the instant case, it should still grant certiorari to review Richardson's conviction and sentence for all the reasons discussed in his still-pending petition for certiorari.